LAW OF FEDERAL EMPLOYMENT

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CASES AND MATERIALS ON THE LAW OF FEDERAL EMPLOYMENT

PREFACE

This student text is a compilation of statutes, regulations, cases and other materials on The Law of Federal Employment. It is designed to provide primary source materials for students in the Graduate Course and other Continuing Legal Education courses in Administrative and Civil Law.

The casebook contains nine chapters organized around major topics in the field of civilian personnel law. The first chapter reviews the legal authorities in the federal civil service area. Chapter 2 reviews the organization and structure of the federal civil service. Chapter 3 outlines the agency grievance system. Chapter 4 addresses the procedural and substantive issues involved in federal employee discipline. Chapter 5 reviews the civilian employee performance appraisal system and performance based personnel actions. Chapter 6 is a review of reduction in force procedures. Chapter 7 summarizes the rules for practice before the Merit Systems Protection Board. Chapter 8 surveys the extent of judicial review of federal personnel actions. The last chapter addresses equal employment opportunity in the federal sector, with emphasis on the complaint process.

Each of these chapters includes materials that highlight principal statutory and regulatory guidance in a particular area. The cases provide interpretations of these provisions and also illustrate those situations in which the law is not yet settled. This book is intended to provide a basic understanding of federal civilian personnel law and to serve as a basic reference for civilian personnel problems.

This casebook does not purport to promulgate Department of Army policy or to be in any sense directory. The organization and development of legal materials is the work product of the members of The Judge Advocate General's School faculty and does not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and the feminine genders unless otherwise specifically stated.

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LAW OF FEDERAL EMPLOYMENT

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CHAPTER 1

INTRODUCTION AND LEGAL FRAMEWORK

1-1. General.

The importance of the Army's civilian workforce has increased greatly during the past ten years as the size of the active uniformed Army has decreased. Despite hiring restrictions and strength reductions, the Department of the Army still employs nearly three hundred thousand appropriated fund civilian employees. Over one-third of the Department of Defense workforce consists of civilian employees. These civilian employees do not have the same relationship to their employer that soldiers have to their superiors. A civilian employee, for example, generally is not subject to the Uniform Code of Military Justice and may leave Federal employment at anytime. The civilian employee may also be represented by a labor union. This book is a survey of the law relating to these civilian employees.

The number of labor unions representing Federal employees has increased significantly in recent years. This increase has heightened the need for judge advocate officers to be well-versed in civilian personnel law to provide essential legal advice on complex civilian personnel matters and labor-management problems. In response to this need for legal advice and expertise, The Judge Advocate General of the Army initiated the Labor Counselor Program in July 1974. Under this program, Army lawyers (military or civilian) are designated at Army installations worldwide to provide legal advice and assistance to the Civilian Personnel Officers and their staffs. These Labor Counselors are expected to be knowledgeable in the policies and procedures applicable to Federal civilian employee personnel actions and to assist the command in promoting healthy labor-management relations. The duties of the Labor Counselor include participating in labor contract negotiations, arbitration sessions, and unfair labor practice proceedings; representing the command in adverse action proceedings and other hearings before the Merit Systems Protection Board; and assisting the command in resolving equal employment opportunity complaints locally and before administrative judges of the Equal Employment Opportunity Commission. The importance of the Labor Counselor's active participation in these varied activities has increased since the Labor Counselor Program was initiated, and The Judge Advocate General reemphasized the value of the program in 1977, 1982, and again in 1985 in TJAG Policy Letter 85-3. Functions of the Labor Counselor have been formally recognized in Army Regulations 27-1, 27-40, 690-600, and 690-700, Chapter 771.

Civilian Personnel Law can be divided into two principal areas. The first area, which concerns the statutes and regulations governing management of Federal employees and personnel actions in general, can be subsumed under the label, "Law of Federal Employment." This is the subject of this text. The second deals with the role of employee organizations (i.e., unions) in the Federal workforce and can be referred to as "Federal Labor-Management Relations." This subject is covered in another text, JA 211. Both areas, however, are interrelated. A judge advocate officer cannot advise management representatives at a bargaining session without first becoming familiar with civilian personnel law generally. A disciplinary action against an employee, inversely, may be challenged through a grievance under a collective bargaining

agreement. It is therefore important to understand both areas to effectively advise commanders or Federal managers on legal problems involving Federal civilian employees.

Current civil service law sets rigorous standards for agencies to follow and establishes three separate agencies to oversee management of the Federal workforce. The Army must follow the policies and procedures established by statute and the regulations of these agencies. The law provides for checks on how well the Army follows these procedures -- through appeals by employees, review of certain programs and regulations, and independent investigation of agency actions. The Army may issue supplemental regulations addressing personnel policies within the Department of the Army only if they comply with the rules and guidelines established by these agencies.

In 1883 Congress enacted the Pendleton Act to reform the Federal civil service system. Under this law, authority for overseeing Federal civilian employment was vested in one executive agency -- the United States Civil Service Commission. For almost a century, the Civil Service Commission, a bipartisan three member commission, set policy and established procedures used by all executive agencies. On January 1, 1979, however, the Civil Service Reform Act of 1978 became law and the Civil Service Commission was replaced by two new agencies: (1) the Office of Personnel Management (OPM), and (2) the Merit Systems Protection Board (MSPB). Each of these agencies took over a portion of the Civil Service Commission's responsibility. The Office of Personnel Management, composed of a Director, a Deputy Director, and five Associate Directors, assumed the responsibility for promulgating regulations governing personnel matters throughout the Federal Government and for assisting the President in overseeing the Federal workforce generally. The Director, who is appointed by the President with the advice and consent of the Senate for a four-year term, implements Administration policy by promulgating policy and establishing procedures applicable to Federal employee matters.

The other agency, the Merit Systems Protection Board, assumed the appellate functions of the former Civil Service Commission. The Merit Systems Protection Board is a three-member bipartisan body whose members are appointed by the President for nonrenewable seven-year terms. The members do not serve at the pleasure of the President, but, rather, can only be removed from office for inefficiency, neglect of duty, or malfeasance in office. The principal function of the Merit Systems Protection Board is to hear and adjudicate employee appeals. It is also responsible for conducting special studies of the civil service system from time to time and for reviewing the rules and regulations promulgated by the Office of Personnel Management. The Merit Systems Protection Board is divided into six regional offices and five field offices which hear appeals within their jurisdiction, although overall rules of practice before the board are standardized and quasi-judicial in nature.

On April 10, 1989, President Bush signed the Whistleblower Protection Act of 1989. Under the provisions of this Act, the Office of Special Counsel was removed from the Merit Systems Protection Board and established as an independent agency. The Special Counsel is appointed by the President with the advice and consent of the Senate for a five-year term. The Special Counsel is charged with receiving and investigating allegations of prohibited personnel practices.

In the Civil Service Reform Act, Congress enacted for the first time general merit principles applicable to all executive agencies and certain other Federal entities. These merit principles are intended to guide all management personnel decisions. These general principles also form the basis for the prohibited personnel practices set forth in the Civil Service Reform Act. Violation of prohibited personnel practices, which embody the merit principles, may result not only in reversal of personnel actions based on these prohibited practices but also in disciplinary action against the offending official. The Special Counsel may file a complaint against any official who commits a prohibited personnel practice, and thereby initiate a disciplinary proceeding before the Merit Systems Protection Board. An official has numerous procedural rights in this type of action, the consequences of which may include suspension, removal, reduction in grade, a five-year debarment from Federal employment, or a civil penalty up to $1,000.

Note. If an offending official is a member of the uniformed services, the Special Counsel may not initiate a disciplinary proceeding before the Merit Systems Protection Board but, rather, will transmit recommendations for appropriate disciplinary action to the Secretary of the appropriate military department. 5 U.S.C. ' 1215(c).

1.2 Constitutional Authority.

The Constitution grants Congress the authority to provide for and control the civil service below the level of Presidential appointments. The United States Constitution, Article II, section 2, provides that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Congress has by statute delegated broad authority to the President to regulate the employees in the executive branch of Government. Congress has also delegated broad rule-making authority to the Office of Personnel Management, subject to direction of the President.

The constitutionality of the establishment of the Civil Service Commission (now the Office of Personnel Management) and the granting to its of broad rule-making authority was upheld in Butler v. White, C.C.W. Va. 1897, 83 F. 578, reversed on other grounds, 171 U.S. 379.

1.3 Statutory Authority.

a. Delegation to the President. The President's general authority to regulate civil service in the executive branch authorizes him to prescribe regulations for the admission of individuals into the civil service of the executive branch and to determine the fitness of applicants for

employment (5 U.S.C. § 3301). His authority also extends to prescribing rules governing the competitive service, including excepting positions from the competitive service (5 U.S.C. § 3302) and prescribing regulations for the conduct of employees in the executive branch (5 U.S.C. § 7301). Implicit in this authority is the power to remove executive branch employees. All the President's authority is exercised within the framework of a very extensive legal structure governing civilian employment found throughout Title 5, U.S. Code.

b. Delegation to the Office of Personnel Management. Congress has given OPM broad rule-making authority in the administration of competitive service examinations and in the implementation of the Congressional policy to give preference in many employment matters to military veterans (5 U.S.C. § 1302). Congress has also authorized the President to delegate to the Director of the Office of Personnel Management the President's authority for personnel management functions. Congress further authorized redelegation of this authority by the Director of OPM to heads of agencies in the executive branch (5 U.S.C. § 1104). For further discussion of the statutory authority of the Office of Personnel Management, see 5 U.S.C. §§ 1101-1105 and §§ 1301-1303.

c. Congressional Control. Despite delegating authority to the President and the Office of Personnel Management, Congress has retained significant authority for itself and has legislated in much detail the terms and conditions of Federal employment. Title 5, Part III, Employees, contains detailed Congressional regulation and control over such things as employment and retention (Subpart B), employee performance, including actions for unacceptable performance (Subpart C), pay and allowances (Subpart D), attendance and leave (Subpart E), and suitability, security, conduct, and adverse actions (Subpart F). In most instances, however, Congress contemplates implementation of its basic rules by the President, OPM, and each of the employing executive agencies.

1.4 Implementation of Statutory Authority.

a. Presidential. The President has implemented the authority granted him under 5 U.S.C. §§ 3301 and 3302 by Executive Order 10577, as amended, set out as a note under 5 U.S.C. § 3301. This Executive Order established Civil Service Rules that prescribe generally how the civil service is to be organized and managed by the Office of Personnel Management. The President also has issued other executive orders independent of the Civil Service Rules that establish Federal policies or create special programs for Federal employees.

b. Office of Personnel Management.

1. OPM has published regulations at Title 5, Code of Federal Regulations, Chapter I, Subchapter B, implementing the general authority granted it under 5 U.S.C. §§ 1101-1105 and 1301-1303, the authority delegated to it by the President pursuant to the President's authority under 5 U.S.C. § 1104, and the various statutory provisions requiring implementation.

2. OPM had previously published a Federal Personnel Manual (FPM) system, which constituted its official medium for issuing to other agencies personnel regulations and

instructions, policy statements, and related materials on Government-wide personnel programs. The FPM system consisted of the basic Federal Personnel Manual, the FPM Supplements, the FPM Letters, and the FPM Bulletins.

Executive Order 12861, signed September 11, 1993, directed the elimination of 1/2 of all federal civilian personnel regulations. To achieve this end, OPM a plan to eliminate, or "Sunset," the FPM system in the fall of 1993. The FPM was officially Sunset on December 31, 1993. Portions of the FPM have been selectively retained and converted into other formats (C.F.R., executive order, or OPM Directive). For most purposes, however, the FPM no longer exists as a reference tool.

1.5 Military Regulations.

a. Department of Defense. In 1978 the Department of Defense established the Department of Defense Civilian Personnel Manual (DODCPM) system to publish uniform, DOD-wide policies governing civilian personnel management programs supplementing selected chapters of the Federal Personnel Manual. DOD Directive 1400.25 and DODCPM 1400.25-M for a discussion of this system. The format and numbering system follow the structure of the former Federal Personnel Manual.

b. Department of the Army. The Army's civilian personnel regulations are located in the 690 series. These regulations contain the official Army instructions governing civilian personnel administration and supplement the DOD Civilian Personnel Manual.

1.6 Case Law.

a. Merit Systems Protection Board. Through 1984 the decisions of the Merit Systems Protection Board (MSPB) were officially published by the board itself and available from the Superintendent of Documents (cite ____ M.S.P.B. ____). In 1985 West Publishing Company assumed official publication of Board decisions in the Merit Systems Protection Board Reporter (cite ____ M.S.P.R. ____). Board decisions are also available through several unofficial sources, such as Information Handling Services (microfiche, CD-ROM, and hard copy) and Labor Relations Press (hard copy). There is a full discussion of MSPB jurisdiction and procedures in Chapter 7 of this book.

b. Equal Employment Opportunity Commission decisions. The decisions of the Equal Employment Opportunity Commission (EEOC) currently are published by Information Handling Services and are available only on microfiche or in CD-ROM format. A full discussion of the role of the EEOC and the processing of equal employment opportunity complaints is provided in Chapter 9.

c. Federal court decisions. Decisions of the MSPB are reviewable directly by the U.S. Court of Appeals for the Federal Circuit. Decisions of the EEOC are reviewable by suit in the U.S. district courts and then by the regional U.S. courts of appeals. A full discussion of judicial review of personnel actions, including equal employment opportunity complaints, is provided in Chapter 8 of this book.

CHAPTER 2

EMPLOYMENT IN THE FEDERAL CIVIL SERVICE

2.1 Types of Civilian Employees.

a. General. The Federal civil service consists of all appointed positions in the three branches of the Federal Government, except those in the uniformed services. 5 U.S.C. § 2101. There are many different types of employees in the Federal civil service. These employees differ in how they are hired or "appointed" into their jobs, how they are paid, and the substantive and procedural due process they receive in certain personnel actions. This chapter will focus on the major categories of Federal civil service employees and on the significance of the differences. These materials address only executive branch employees; employees of the judicial and legislative branches are beyond the scope of this text.

Positions in the Federal civil service generally can be divided into three categories: the competitive service, the excepted service, and the senior executive service. All are defined by statute. The vast majority of DOD employees are either in the competitive or excepted service; therefore, this text will not address problems involving the senior executive service employees.

b. The competitive service. The competitive service consists of all civil service positions in the Federal Government that are not specifically excepted from the competitive service by statute, by the President, or by the Office of Personnel Management (OPM). 5 U.S.C. § 2102. Sometimes these employees are referred to as "classified civil servants" or "classified service" employees. Many acts of Congress use these terms interchangeably. Employees generally enter the competitive service only after passing a competitive examination.

c. The excepted service. As noted above, positions may be excepted from the competitive service by Congress, the President, or, more commonly, OPM. Sometimes employees in the excepted service are referred to as "unclassified employees." Excepted service employees generally are not required to pass competitive examinations before being employed by the Federal Government.

There are three categories or "schedules" of excepted service positions. OPM publishes an annual update of these schedules in the federal register, usually in September or October. Schedule A consists of those positions not of a confidential or policy-determining character for which an examination is not practicable; attorneys, chaplains, Presidential appointees not confirmed by the Senate, White House Fellows, and certain handicapped and low-level summer employees are examples of Schedule A employees.

Schedule B consists of those positions not of a confidential or policy-determining character for which it is not practicable to hold a competitive examination. OPM may, however, require a noncompetitive examination for Schedule B positions. Some examples of Schedule B positions include many student trainee positions under cooperative education programs, Secret Service positions, and certain specialists in cryptography, systems analysis, and tax accounting.

Schedule C consists of all excepted positions of a confidential or policy-determining character. These positions are subject to political patronage and are found at all levels within the civil service. Included in Schedule C are not only special staff assistants, general counsels, and directors of various programs, but also private secretaries, chauffeurs, and couriers.

d. Significance of status as competitive or excepted service employee. An employee's due process rights are tied to employment status in the competitive service or excepted service. Competitive service employees generally receive procedural and substantive due process rights in connection with certain personnel actions after one year, while most excepted service employees must serve a two-year "probationary" period before becoming entitled to due process. See, e.g., 5 C.F.R. § 752.401(c).

There are two exceptions to the rule stated above. the first exception is that excepted service employees who are either war veterans or have been deployed and received an expeditionary or campaign badge generally receive rights equivalent to those of competitive service employees under the Veterans' Preference Act of 1944, P.L. 78-359, 58 Stat. 387, June 27, 1944. Dreher v. U.S. Postal Service, 711 F.2d 907 (9th Cir. 1983). Included in this group are veterans of the Gulf "War" (those having served in the theater) and those receiving the expeditionary medal for relief efforts in Somalia, Rwanda, Macedonia, or Haiti.

The second exception allows actions against all "probationary" employees without the normal due process. All new civil service employees are required to serve a probationary period. More specifics of this probationary requirement will be addressed in detail later; however, a competitive service employee or a preference eligible excepted service employee gets virtually no procedural or substantive due process protections until after the one-year probationary period. Immigration and Naturalization Serv v. Fed. Labor Relations Auth., 709 F.2d 724 (D.C. Cir. 1983); Stern v. Dep't of Army, 699 F.2d 1312 (Fed. Cir. 1983). Other excepted service employees receive no due process until after two years of current, continuous service.

A more detailed review of employee rights is contained in Chapters 3 and 4 of this text.

e. Notes and Discussion.

Note 1. Positions are often converted from the competitive service to the excepted service and vice versa. What happens when a position is changed from the competitive service to the excepted service? Does the incumbent employee forfeit the procedural safeguards? In Roth v. Brownell, 215 F.2d 500 (D.C. Cir.), cert. denied, 348 U.S. 863 (1954), Mr. Roth, a GS-14 trial attorney in the Department of Justice, was summarily removed from his position effective July 31, 1953, by a letter dated June 29, 1953. At the time of his removal, Mr. Roth occupied a Schedule A, excepted service position. He had been transferred into that position in 1947 from a competitive service position that he had held for more than four years. In 1947 the President had issued an executive order transferring all attorney positions to the excepted service. The Department of Justice argued that Mr. Roth had not been removed from his position in 1947 but had merely ceased to be in the competitive service on the date of the executive order. There was, therefore, no need to comply with the statutory protections applicable to competitive service

employees in removing him from his position in 1953. The court concluded that whether Mr. Roth was technically removed from his position in 1947 or in 1953, there still had been no compliance with the requisite statutory requirements. The court held:

> Neither the formula of "excepting" the kind of position a person holds, nor any other formula, can obviate the requirement of the Lloyd-LaFollette Act that "No person in the classified civil service of the United States shall be removed * * * therefrom" without notice and reasons given in writing. The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear.
>
> It is immaterial here that the President has long been authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof * * *." . . [5 U.S.C. § 3301]. (Emphasis added.) Complete control over admissions does not obviate the removal requirements of the Lloyd-LaFollette Act.
>
> In our opinion the plaintiff is entitled to a summary judgment that his removal from his position was not in accordance with law and that he should be restored to the position.

The general rule in cases involving transfer of positions from the competitive service to the excepted service is now stated in 5 C.F.R. § 212.401(b). "An employee in the competitive service at the time his position is first listed under Schedules A, B, or C remains in the competitive service while he occupies that position."

Note 2. The Veterans' Preference Act of 1944, codified in various sections of Title 5 of the United States Code, gives veterans and certain other individuals called "preference eligibles" several advantages in securing and retaining Federal employment. See 5 U.S.C. § 2108 for a definition of "preference eligible." Some of the advantages conferred on veterans are the following: (1) authorizing bonus points on competitive examinations, 5 U.S.C. § 3309; (2) waiving physical qualifications for appointment, 5 U.S.C. § 3312; (3) requiring no passovers without justification of veterans eligible for appointment to Federal positions, 5 U.S.C. § 3318; (4) affording veterans greater tenure in reductions-in-force, 5 U.S.C. § 3502; and (5) specifying additional procedural safeguards for veterans undergoing adverse actions, 5 U.S.C. §§ 7511-13. Veterans receive no special consideration for promotions under this statute, but the initial hiring advantage and the retention rights have allowed veterans to fill a large number of Federal jobs compared to their composition of the total work force. The statutory advantages bestowed on veteran preference eligibles is covered in more detail later in this text.

Nonveterans have frequently challenged in Federal court the significant benefits provided to veterans by law. In one such case, Fredrick v. United States, 507 F.2d 1264 (Ct. Cl. 1974), the plaintiff claimed he was entitled to the job retention protection of the Veterans' Preference Act in 5 U.S.C. §§ 3501-3502 during a reduction-in-force. His challenge was based on the equal protection and due process clauses of the Fifth Amendment; he alleged discrimination because he had "served" his Government in a civilian capacity as a War Service Appointee. The Court of

Claims upheld the validity of the veterans' preference provisions in holding that the classification of "veterans" was not unreasonable or arbitrary and that veterans' preferences had in fact existed in the United States since 1876. Among the justifications discussed by the court were (1) a soldier's the loss of personal freedom, (2) the rigors of military duty--discipline, possible relocation overseas, and potentially hazardous duty, and (3) the problems of reorientation to civilian life upon return to the civilian community. The court found a rational basis for differentiating between veterans and those who performed alternative service and upheld the validity of the statute.

More recently, the United States Supreme Court upheld the Massachusetts veterans' preference statute in an equal protection challenge. In Massachusetts v. Feeney, 442 U.S. 256 (1979), the Massachusetts law gave veterans an absolute preference over nonveterans if they passed the state civil service exam. The Massachusetts law provides an even broader right of preference than the federal law. In upholding the Massachusetts statute, the Supreme Court therefore effectively eliminated future challenges to the Federal preference provisions.

2.2 Becoming a Federal Civil Service Employee.

Many of an employee's procedural and substantive due process rights depend on the employee's status. Understanding the legal requirements for attaining employee status is therefore essential to determine the employee's rights.

a. Statutory requirements generally. For a person to attain the status of employee of the Federal Government, 5 U.S.C. § 2105 requires three elements. The first step is appointment in the civil service by one of several designated officials; the second is performance of a Federal function; and finally, and supervision in the performance of duties by a federal official. All three requirements must be satisfied for the individual to become an employee. Of the three requirements, the appointment requirement has generated the most controversy and litigation.

b. The appointment requirement. The appointment of a Federal civilian employee generally requires the execution of a Standard Form 52, "Request for Personnel Action," an OPM form used throughout the Federal Government. An appointment can, however, also be evidenced by a completed Standard Form 50, "Notification of Personnel Action." While both forms are normally used in an appointment, either form, if signed by the approval authority (appointing authority), will result in an appointment of the individual to a particular position in the civil service. Normally the Civilian Personnel Officer is the appointing/approval authority. The requirement of a proper appointment is demonstrated by the two cases that follow, one involving an employee's attempt to obtain additional retirement credit and the other involving the running of a probationary period. See also Horner v. Acosta, 803 F.2d 687 (Fed. Cir. 1986) (finding contract employees hired by Navy to perform intelligence functions were not appointed and were therefore not employees entitled to retirement credit) and Costner v. United States, 665 F.2d 1016 (Ct. Cl. 1981) (finding employee of government contractor RCA was not a federal employee despite years of working in federal worksite under supervision of federal official).

BEVANS v. OFFICE OF PERSONNEL MANAGEMENT
900 F.2D 1558 (Fed. Cir. 1990)

This petition to review challenges the decision of the Merit Systems Protection Board (Board), affirming the reconsideration decision of the Office of Personnel Management (OPM) that, in determining the petitioner's survivorship benefits of her deceased husband, a federal employee when he died, the time he spent as an employee of a proprietary corporation of the Central Intelligence Agency (CIA) could not be included. Bevans v. Office of Personnel Management, No. SF08318910383 (M.S.P.B. Jun. 23, 1989). We affirm.

I

The basic facts, as found by the Board and as shown by the record, are as follows.

In the 1960's and 1970's, the CIA had several so-called proprietary corporations, which it owned. Two of these were Air America, Inc. (Air America) and its subsidiary, Air Asia Company, Ltd. (Air Asia). These companies were air carriers that operated primarily in the Far East and that the CIA used in conjunction with its operations. (Apparently the CIA used these companies interchangeably, and in this opinion we usually refer to either or both of them as "Air America."). Air America had a large number of employees. Some of its officials also were CIA employees. The petitioner's deceased husband, Henry P. Bevans (Bevans), was a lawyer with considerable experience in airline work. In early 1964, Clyde Carter, the secretary and legal counsel of Air America, suggested to Bevans the possibility of his working for that company. After discussions, Mr. George A. Doole, Jr., the chief executive officer of Air America, who also was an undercover CIA employee, offered Bevans a position as an attorney with Air America. Bevans was to start work in Washington, D.C., but shortly thereafter would be moved to Taipei, Taiwan. The offer of employment, on an Air Asia letterhead, stated: "This letter constitutes the only authorized offer of employment to you from or on behalf of the Company."

Bevans accepted the offer and began work in Washington, D.C., on August 3, 1964.

In a handwritten 1980 letter from Bevans to another former Air America employee, Jerry Fink, in connection with Fink's appeal to the Board from OPM's denial of Fink's claim for civil service retirement credit for Fink's service with that company, Bevans stated:

Sometime during that first week (probably Aug. 5), after reviewing the corporate files, I raised with Mr. Bastian the question of the exact relationship between Air America and Southern. At that point, I was taken into Mr. Doole's office. He administered to me the oath set out in Title 5, Sec. 3331 and gave me a detailed explan[ation] of the ownership, control and management of Air America, Inc. and its associated companies. [Underlining in original.]

Bevans worked for Air America and Air Asia until December 1976. During that employment, government retirement contributions were not deducted from his salary and deductions sometimes were made for Social Security taxes. In March 1977, Bevans went to work as a civilian for the United States Air Force. None of

his Air America employment was credited to him for retirement or leave computation purposes, and he made no objection despite the adverse immediate effect that had on the amount of leave. While so employed, he died in January 1982.

His widow, the petitioner, filed an application for survivor benefits. The application was based upon Bevans' service with both Air America and the Air Force. In response to a request from her lawyer, the CIA declined to certify Bevans' employment with Air America "as federal service for the purpose of obtaining certain federal death benefits" because "[e]mployees of Air America, Inc., are not federal employees within the meaning of 5 U.S.C. § 2105(a), which is the operative definition for purposes of civil service retirement credit. 5 U.S.C. § 8331(1)(A)."

In its reconsideration decision, OPM ruled that "because he was not appointed in the civil service during the term of his contract from August 3, 1964 through December 6, 1976 his service during this period is not creditable for civil service retirement purposes."

The Board affirmed that decision. The administrative judge, whose initial decision became the decision of the Board, found that the petitioner has failed to establish by preponderant evidence that her husband was appointed to a position in the civil service. There is no clear and unequivocal document appointing Mr. Bevans to the civil service. In addition to the absence of any such document, the other indicia of appointment are also absent. There is no evidence that Mr. Bevans was paid through the civil service system. Though Mr. Bevans was apparently administered an oath of office, there is no evidence that the person who administered the oath was authorized to do so or to hire employees on behalf of the CIA. An appointment to the civil service can only be made by a person authorized to make the appointment. Finally, another indicia of federal employment, at the time, was that a federal employee's salary was not subject to Social Security withholding. The appellant's documents show that Social Security withholding was taken out of her husband's earnings from Air America.

I find, therefore, that the agency's decision to deny civil service credit for Mr. Bevans' service with Air America was proper. It is well established that an appointment is necessary for a person to hold a government position and be entitled to its benefits.

II

Section 8332 of Title 5 of the United States Code provides that service as an "employee" is creditable for the Act's purposes. 5 U.S.C. § 8332 (1988). The term "employee" is defined in 5 U.S.C. § 8331(1)(A) (1988) by reference to 5 U.S.C. § 2105(a) (1988), which in turn defines "employee" to mean an individual who, among other requirements, has been "appointed in the civil service by one of [listed employees] acting in an official capacity." This court twice has considered whether service with government proprietary corporations or units engaged in intelligence activities qualifies for civil service retirement credit.

Horner v. Acosta, 803 F.2d 687 (Fed.Cir.1986), involved employment as "independent contractors" pursuant to employment contracts between individual employees and a naval unit and a naval proprietary corporation, both of which were engaged in intelligence activities. The Board ruled that service pursuant to such contracts was entitled to credit for civil service retirement purposes. This court

reversed, holding that the employment contracts did not make the individuals "employees," because they had not been "appointed in the civil service." Id. at 693-94.

The court quoted with approval the statement in Baker v. United States, 614 F.2d 263, 268 (Ct.Cl.1980), that to qualify as an "employee "an individual must have "been appointed to that position by a person authorized to make the appointment." Acosta, 803 F.2d at 692. The court ruled that "definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. § 2105(a)." Id. at 693. The court noted the "absence of the usual indicia of civil service, such as an executed SF [Standard Form] 50 or 52 as an appointive document." Id. at 694. (A Form 50 is a federal government personnel form used to record a personnel action, and a Form 52 is one used to initiate a federal personnel action.) The court concluded:

In view of the Board's express finding that respondents were not appointed in the civil service when they were engaged to work in the unit, and the substantial evidence to support that finding and the Board's erroneous conclusion that contract service, without appointment, is creditable for [CSRA] purposes, we must reverse the Board's decision. Id. at 696.

.....

[1] A. Under these standards defining the requirement that to qualify for civil service retirement benefits, an individual must have been "appointed in the civil service," the Board did not err in concluding that the petitioner had not shown that Bevans had been so appointed.

As noted, the court in Acosta referred to "an executed SF 50 or 52 as an appointive document" as one of "the usual indicia of civil service status." 803 F.2d at 694. There is nothing in the record to show that either Form 50 or Form 52 was executed for Bevans, and the petitioner makes no claim that it was. Although there are several executed personnel forms in the record that pertain to Bevans, all captioned "Request for Personnel Action," they are Air America forms, not those customarily used to make an appointment in the civil service.

The forms themselves have no indication that they are federal government forms. The spaces for signature list among the potential signers "President," and two of them were signed by that officer. The first line has space for listing the name of the individual for which action is requested "(IN ENGLISH)" and "(IN CHINESE)." As the petitioner's witness Mr. Merrigan, a former Air America attorney who dealt with personnel matters, explained, this was "an Air America form also called Request for Personnel Action. It's also copied, certainly not identical, but in many respects it's similar to the federal form. It was copied from it."

Moreover, there was no evidence that any of the officials with whom Bevans dealt in obtaining his position with Air America was authorized to make appointments in the civil service. The only authority those company officials appeared to have had was to appoint individuals to positions with their company. All the record shows is that Bevans was appointed to a legal position with Air America, and not to a position in the civil service. Indeed, the letter offering Bevans

the position stated that it "constitutes the only authorized offer of employment to you from or on behalf of the Company."

As the court stated in Watts, one of the "essential prerequisites" of a civil service appointment is "an authorized appointing officer who takes an action that reveals his awareness he is making an appointment in the United States civil service." 814 F.2d at 1580. That requirement was not met here.

.....

[8] D. The petitioner argues that even if the objective evidence does not establish that Bevans was appointed in the civil service, Bevans believed that he had been so appointed and therefore should be treated as having been so appointed. The record, however, does not establish that Bevans believed he had been appointed in the civil service.

The argument apparently is that since Bevans was aware that Air America was a CIA proprietary company, and since the officers with whom he dealt in obtaining employment were CIA employees, he necessarily believed that he received an appointment in the CIA when he was appointed as a lawyer with Air America. Not only does the argument lack evidentiary support for crucial elements, but it is a non sequitur. The fact that the CIA controlled Air America and that CIA employees may have hired Bevans, does not establish that Bevans, unlike the vast bulk of Air America employees, became a CIA employee when he was employed by Air America, or establish that Bevans believed he had been so appointed in the civil service.

[9] E. Finally, the petitioner contends that even if Bevans was not appointed in the civil service, the government should be equitably estopped from making the contention. The argument rests on the factual assumption, which the record does not establish, that Bevans believed he had received such an appointment. Moreover, there is no evidence that the government misrepresented to Bevans or misled him into believing that he was a civil service employee, or that Bevans relied upon that belief to his detriment.

Skalafuris v. United States
683 F.2d 383 (Ct. Cl. 1982)

Plaintiff's case is the most recent in a series of cases which have called upon the court to define what constitutes Federal employment. The dispute here concerns the date on which plaintiff commenced employment with the Government. Upon that determination depend the procedural rights to which he was entitled upon termination. The Government contends that the date entered on various personnel action forms controls; plaintiff argues that he was appointed and commenced work at least a month earlier. It is not disputed that, if he was no longer a probationary employee at the time of his termination, plaintiff was not accorded all of the procedural rights to which a nonprobationary employee is entitled. The Civil Service Commission decided that plaintiff was a probationary employee at the time of his termination. We hold that, as a matter of law, this was correct.

I.

On October 29, 1973, the Naval Research Laboratory (NRL) advertised an opening for the GS-15 position of Head, Mathematics Research Center (MRC). Plaintiff applied for the job in November 1973 and was interviewed at NRL in December. He was selected as the best candidate in January 1974 by Dr. Paul Richards. Dr. Richards then sent a memorandum, with attached routing slip, to Dr. Herbert Rabin and Dr. Alan Berman, making this recommendation and asking for their approval. The memorandum was dated January 22, 1974, and Drs. Rabin and Berman signified their approval by initialing the routing slip on January 29 and 30, 1974, respectively. Plaintiff had been informed of his selection by telephone in mid-January, and a Standard Form 52 (SF-52), Request for Personnel Action, was prepared for him, as well as a request for Civil Service certification.

Plaintiff arrived at NRL immediately after approval of his selection. On January 31, 1974, he received a temporary identification badge. The record plainly shows that plaintiff was actively engaged in his new duties throughout February. On February 22 and March 7, 1974, he was paid by voucher for this work.

On March 4, 1974, plaintiff executed an Appointed Affidavit (the oath of office), and on March 5, 1974, a Standard Form 50 (SF-50), Notification of Personnel Action, was executed. Both of these documents, as well as the SF-52 completed earlier, give the effective date of plaintiff's appointment as March 5, 1974. The March 5th date is the one which the Government contends is the correct date of appointment.

On January 20, 1975, after nearly a year at NRL, plaintiff received a supervisor's evaluation from Dr. Richards which recommended his retention because he was performing well. However, on February 24, 1975, plaintiff received a memorandum from Dr. Berman stating that he would be terminated on March 3, 1975, for inadequate performance. The SF-50 which accompanied the termination notice was later superseded by another which gave no reason for termination.

Plaintiff appealed his removal unsuccessfully for several years. Upon receiving a final denial of reconsideration of his case on June 5, 1980, plaintiff filed in this court on August 18, 1980, for back pay and reinstatement to his original grade.

II.

This court set out the law governing plaintiff's status as a Federal employee in Costner v. United States:

> There is no dispute as to the applicable statutory provision. "Employee" is defined in the United States Code as a person who is
>
> (1) appointed in the civil service by one of the following acting in an official capacity --
>
> . . . . .
>
> (C) a member of a uniformed service;
> (D) . an individual who is an employee under this section;
>
> . . . . .
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

It is obvious from the statutory language that there are three elements to the definition -- appointment by an authorized Federal employee or officer, performance of a Federal function, and supervision by a Federal employee or officer -- and that they are cumulative. A person must satisfy each requirement.

. . . .

We grant that plaintiff, from late January 1974, was performing a Federal function and was supervised by a Federal employee. But as the court said in Baker v. United States, which considered this problem:

> If [plaintiff] did not have a Federal appointment, it will not be necessary to consider the other two requirements, as it is well settled that all three tests must be met by an individual before he can be a Federal employee.

Thus, the work plaintiff did at NRL between late January 1974 and March 5, 1974, and the fact that he was represented to others as the head of MRC, while important to an overall case for Federal employment, do not bear directly on the question of appointment. We turn then to the facts bearing on the existence and date of plaintiff's appointment.

III.

The standard to be applied here is whether plaintiff was "appointed to [his] position by a person authorized to make the appointment." At the outset, it is conceded that the persons who selected and approved the selection of plaintiff were persons "authorized to make the appointment." Therefore, the question before us is only whether plaintiff was in fact appointed.

Recognizing that appointment is a single, discrete act, plaintiff argues that he was appointed by the action of Dr. Rabin's initialing the routing slip on January 29, 1974. We cannot agree, however, that Dr. Rabin's act had that effect.

The documents effecting plaintiff's appointment all specify March 5, 1974, as plaintiff's date of appointment. The SF-52 gives "3-5-74" as the effective date for the requested action, which is described as "C[areer] C[onditional] Appt" (emphasis

supplied]. It is hardly coincidental that the next personnel action documents were not executed until on or about March 5, 1974. On the Appointment Affidavit, signed on March 4th, the space for "(Date of appointment)" is filled in with "3/5/74." Finally, the actual notification form, the SF-50, gives "03/05/74" as the effective date of plaintiff's "CAREER CONDITIONAL APPOINTMENT." Furthermore, the SF-50 notes that the appointment is "subject to completion of 1 year probationary (or trial) period commencing "03/05/74." We have in the past cases emphasized the importance of the SF-52, SF-50, and oath of office in determining the date or existence of an appointment,[15] and in this case they unequivocally set the date of appointment at March 5, 1974.

. . . .

We may therefore conclude, on the basis of all of the Government documents which purport to describe plaintiff's status, that the plaintiff was appointed on March 5, 1974, and that his probationary period ended on March 5, 1975, two days after he was terminated.

We have only left to discuss plaintiff's direct evidence for an earlier appointment date, the routing slip. The first key point is that the memorandum being approved on the slip does not recommend the appointment of plaintiff. Rather, it recommends "that Dr. Skalafuris be offered the GS-15 position of Head of the Mathematics Research Center" (emphasis supplied). While we have no doubt that in approving this recommendation Drs. Rabin and Berman expected and intended that plaintiff would eventually be appointed, the fact is that the process had not progressed to the appointment state at that point. Plaintiff still had to be notified of the offer, had to accept it, NRL needed to request the appointment, the Civil Service Commission had to certify plaintiff, and plaintiff had to take his oath of office. It is hard to believe that Drs. Rabin and Berman thought they were appointing plaintiff, even if they had the power to do so at that point. This can hardly be characterized as the "last act" defined in Marbury v. Madison.

Furthermore, it would seem to us very odd that the Government appointive process should be consummated by initials on a routing slip. We emphasize, as we noted in Goutos v. United States, the chaotic effect on the Government of a vague or informal procedure for Government hiring. Plaintiff cannot base his appointment on the initialed approval of a memorandum recommending that he be given an offer.

. . . .

We therefore conclude, after careful consideration of the brief and after hearing oral argument, that the Civil Service Commission was correct as a matter of law in finding that plaintiff was not appointed to his position until March 5, 1974, and that

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[15] Goutos, 212 Ct. Cl. at 98, 552 F.2d at 924 (SF-52, in facts of that case, is "the sine qua non to [an] appointment"); Shaw v. United States, 223 Ct. Cl. 532, 546, 622 F.2d 520, 528, cert. denied, 449 U.S. 881, 101 S. Ct. 231, 66 L.ED.2d 105 (1980) (in determining date of end of probationary period, the Civil Service Commission properly looked to "the date of his appointment evidenced in Standard Form 50"); Costner v. United States, 229 Ct. Cl. at __, 665 F.2d at 1023 (importance of oath of office). See also Vukonich v. Civil Serv. Comm'n, 589 F.2d 494, 496 (10th Cir. 1978) (completion of an SF-50 necessary to appointment).

consequently he was still in his probationary period when he was terminated on March 3, 1975. Because of this disposition of the case, we do not address the other defenses raised by the Government. There being no genuine issue as to any material fact, defendant's cross-motion for summary judgment is granted; plaintiff's motion for summary judgment is denied; and the petition is dismissed.

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c. Federal function and supervision. The other two requirements of 5 U.S.C. § 2105 have generated very little litigation. They were considered, however, in McCarley v. MSPB, 757 F.2d 278 (Fed. Cir. 1985), where the court reaffirmed that all three requirements of 5 U.S.C. § 2105 must be met for an individual to attain "employee" status. The court determined that McCarley was not an employee even though he had been appointed, because he had not yet started work and therefore had neither performed a Federal function nor been supervised while performing his duties by a Federal employee. Because McCarley was merely an appointee and not an employee, he was not entitled to the procedural protections established by law for employees when management canceled his appointment.

d. Notes and discussion.

Note 1. While the courts have determined that a completed SF 50, SF 52, or oath of office constitutes the sine qua non of a valid appointment into the Federal civil service, the presence of such documentation does not necessarily control an individual's status. See Grigsby v. Dep't of Commerce, 729 F.2d 772 (Fed. Cir. 1984), where the Department of Commerce was permitted to demonstrate with independent evidence that the information on the forms was erroneous. In Grigsby the employee was aware that the information on the SF 50 and SF 52 erroneously reflected that he had been hired by transfer and that his probationary period was completed. The court suggested that the result might have been different if the employee had been unaware of the error and had relied to his detriment on the erroneous information.

Note 2. A proper appointment is normally necessary to become an employee, but the MSPB has acknowledged a limited exception. If an appointment is found to be improper or erroneous under law, rule, or regulation after an individual has been appointed to a position, has entered on duty, and the other criteria of 5 U.S.C. ' 2105 have been met, the individual is considered an employee unless the appointment violates an absolute statutory prohibition. Travaglini v. Dep't of Educ., 23 M.S.P.R. 417 (1984). Absent such an absolute statutory prohibition on appointment, the employee is entitled to all the due process rights that a similarly situated employee would receive. See Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983), where the court determined that this rule applies even if the individual allegedly obtained the appointment through material misrepresentation.

The foregoing discussion demonstrates the importance of the status of "employee" within the statutory definition. A competitive service employee receives additional rights and protections that escalate with seniority.

2.3 Employee Status Upon Appointment in the Competitive Service.

a. Probationary period. An individual appointed to a competitive service position ordinarily must serve a one-year probationary period before attaining full competitive status. 5 C.F.R. §§ 315.801-802. Competitive status refers to "an individual's basic eligibility for noncompetitive assignment to a competitive position." 5 C.F.R. § 212.301. This allows an employee to be transferred, promoted, reassigned, or demoted without open competitive examination. The employee automatically attains competitive status at the end of the one-year probationary period.

This probationary period is an extension of the hiring process; it is an opportunity for management to evaluate on the job the employee's fitness for the position. During this period, if the employee by conduct or performance fails to demonstrate fitness for the position, management should terminate the employee. During this period, management has virtual summary removal authority unconstrained by the detailed procedural requirements that apply to nonprobationary competitive service employees. Probationary employee rights are covered later in this text in the discussion of personnel actions and procedural requirements. The following case explains how the probationary period is calculated and the results of management failing to remove an employee before the probationary period expires.

DANIEL v. DEPT. OF VETERANS AFFAIRS, 68 M.S.P.R. 459

Merit Systems Protection Board
Aug. 3, 1995

Employee petitioned for review of initial decision dismissing her appeal of removal for lack of jurisdiction. The Merit Systems Protection Board held that: (1) where probationary employee's tour of duty on day before her anniversary date ended at 7 a.m. and agency effected her separation at 7 a.m., employee had completed her probationary period when she was removed, so that Board had jurisdiction over her appeal, and (2) employee's termination without being given opportunity to respond to the charges violated her constitutional right to due process.

Petition granted; initial decision reversed; removal not sustained.

.....

The agency terminated the appellant from the position of GS-5 Police Officer effective January 22, 1995. Agency File, Tab A. The administrative judge dismissed the appellant's petition for appeal after finding that the appellant was terminated during her probationary period for post-appointment reasons, that she did not allege that the termination was based on partisan political reasons or marital status discrimination, and thus that the Board lacked jurisdiction over her appeal. Initial Decision (I.D.) at 2-4. The appellant has filed a petition for review to which she has attached documents already submitted below. Petition For Review (PFR) File, Tab 1. The agency has filed a timely response opposing the petition.

.....

The facts as found by the administrative judge are not in dispute. The agency appointed the appellant to her position on January 23, 1994, subject to completion of a one-year probationary period. Agency File, Tab M. In a memorandum dated January 19, 1995, it notified the appellant that she would be discharged effective "at the end of your tour of duty that begins at 11 PM on January 21, 1995." Id., Tab B. The appellant's tour of duty ended at 7 a.m. on January 22, 1995, and she was terminated at that time. I.D. at 2; Initial Appeal File, Tabs 9, 13.

[1][2] The administrative judge found that because the appellant had been scheduled to work the shift beginning at 11 p.m. on January 22, 1995, and ending at 7 a.m. on January 23, 1995, she had not completed her probationary period when she was terminated at 7 a.m. on January 22, 1995. I.D. at 2 n. 1. We find that the administrative judge incorrectly interpreted the relevant case law. A separation action must be effected prior to the end of the probationer's "tour of duty" on the last day of probation, which is the day before the anniversary date. See, e.g., Stanley v. Department of Justice, 58 M.S.P.R. 354, 357 (1993); Burke v. Department of Justice, 53 M.S.P.R. 372, 375 (1992). Here, the appellant's last day of probation was January 22, 1995, because her anniversary date was January 23, 1995. The end of the appellant's tour of duty on January 22, 1995, occurred at 7 a.m. Because the agency effected her separation at 7 a.m., and not before that, she had completed her probationary period when she was removed. See, e.g., Stanley, 58 M.S.P.R. at 357. The fact that the appellant was scheduled to begin another tour of duty on January 22, 1995, that would not end until January 23, 1995, is irrelevant. Thus, we find that the appellant's probationary period ended at the completion of her last full tour of duty ending on the day before her anniversary date, and the Board has jurisdiction over this appeal. Id.

[3][4] Where an agency takes an appealable action without affording an appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, the action must be reversed because it violates the appellant's constitutional right to minimum due process. Stephen v. Department of the Air Force, 47 M.S.P.R. 672, 680-81 (1991), citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985). Here, although the January 19, 1995 memorandum afforded the appellant prior notice and an explanation of the agency's charges, it did not provide the appellant with an opportunity to respond to the charges. See Agency File, Tab B. Thus, the agency action must be reversed. See, e.g., Drummonds v. Department of Veterans Affairs, 58 M.S.P.R. 579, 584-85 (1993); cf. Stanley, 58 M.S.P.R. at 357- 58 (where the appellant received prior notice, an explanation of the evidence, and an opportunity to respond, the agency accorded the appellant the requisite minimum due process in effecting his separation, and the case was remanded for a determination of whether the agency committed harmful procedural error).

Although Daniel may seem like an aberration, the last minute termination scenario is all too common in the civil service. For various reasons, supervisors procrastinate removing a probationer until the last possible day--or minute, as demonstrated in Daniel.

Under some circumstances, an employee may have to serve more than one probationary period while moving from one job to another within Federal employment. An employee may be able to "tack" time served in a probationary period toward satisfaction of the probationary period in a new position. The following case outlines when tacking is permitted and when an entirely new probationary period is required.

FRANCIS v. DEPARTMENT OF the NAVY
53 M.S.P.R. 545
Merit Systems Protection Board.
April 10, 1992.

The appellant worked for the Department of the Navy as a GS-9 Nurse Specialist from January 27, 1991, until she was separated effective July 1, 1991. See Initial Appeal File (IAF), Tab 4, Subtabs 1 and 6. The agency effected the separation under 5 C.F.R. part 315, subpart H, based upon the appellant's failure to effectively perform the duties of her position. The appellant filed an appeal with the Board's Philadelphia Regional Office. See IAF, Tab 1. The administrative judge provided the appellant with an opportunity to file evidence and argument showing that her appeal was within the Board's jurisdiction. See id., Tab 2. The appellant, in response to the order, argued that the Board had jurisdiction over the appeal because she had over one year of continuous service in her Nurse Specialist position. See id., Tab 5. The agency moved for dismissal of the appeal for lack of jurisdiction. See id., Tab 3.

In his initial decision, the administrative judge agreed with the agency. He found that the appellant had been serving in a probationary period at the time she was separated because (1) she was appointed from a register and therefore properly required to serve a one-year probationary period, (2) she was separated less than a year after her appointment, and (3) her prior service as a Clinical Nurse in the Department of the Army (beginning more than a year before her separation) was not creditable toward completion of the probationary period because it was not performed in the same agency as the one that separated her. He found further that the appellant had not raised any allegation that her separation was based on partisan political reasons or marital status, and thus the Board lacked jurisdiction over the appeal. See Initial Decision at 1-4.

In her petition for review, the appellant contends that she completed her probationary period before she was separated, and that the Board therefore has jurisdiction over her appeal. See PFR File, Tab 5.

ANALYSIS

The appellant was separated from a position in the competitive service. See IAF, Tab 3, Subtab 1 at 1. Under 5 U.S.C. §§ 7511(a)(1)(A) and 7513, employees in the competitive service are entitled to appeal their separations to the Board only if they are not serving a probationary period under an initial appointment, or if they have

completed a year of current continuous employment under other than a temporary appointment limited to a year or less. Because the appellant was hired from a civil service register, she was required by law to serve a one-year probationary period. See 5 C.F.R. § 315.801(a)(1); Sullivan v. Department of Agriculture, 32 M.S.P.R. 194, 196 (1987). [FN1] As the administrative judge noted, the appellant was separated on July 1, 1991, less than a year after her January 27, 1991, appointment. See IAF, Tab 3, Subtabs 1, 6. The appellant alleges, however, in her petition for review, that her prior service as a Clinical Nurse in the Department of the Army should be credited toward completion of her probationary period, and that, when this credit is given, she has completed her probationary period. FN1. The appellant's Standard Form 50, dated January 27, 1991, states that her "[a]ppointment is subject to completion of one year initial probationary period." IAF, Tab 4, Subtab 2.

[1] The Board has held that service prior to an appointment may be creditable toward completion of the probationary period if: (1) the prior service was rendered immediately preceding the appointment; (2) the prior service was performed in the same agency and in the same line of work as the service performed under the appointment; and (3) there has been no more than one break in service of less than 30 days. See Peery v. Department of the Navy, 40 M.S.P.R. 377, 379 (1989).

[2] Here, according to the record, the appellant's prior service as a Clinical Nurse was performed immediately before her present appointment, and there was no break in her service as a Clinical Nurse and a Nurse Specialist. See IAF, Tab 3, Subtab 2, and Tab 5. Thus, the appellant has established that she has met the first and third criteria needed to show that her service as a Clinical Nurse should be credited toward completion of the probationary period. The essential question in this case, then, is whether the appellant has met the second criterion. [FN2] The appellant argues that, because both the Department of the Army and the Department of the Navy are part of the Department of Defense, they should be considered part of the "same agency." [FN3] For the reasons stated below, we disagree.

FN2. The similar titles of the two positions, and the appellant's unchallenged characterization of the nature of her work, see IAF, Tab 5 (appellant's response to agency's motion to dismiss appeal), indicate that the appellant has met the "same line of work" requirement of the second criterion. In light of our conclusion below, however, we need not make a final determination regarding this matter.

FN3. She has cited no specific authority in support of this argument.

.....

The statutory provisions and legislative history described above demonstrate that Congress intended, in redesignating the Department of the Army and the Department of the Navy as military departments, to allow their independent appointing authority and other personnel functions to continue, and to continue to treat the two departments as separate agencies for purposes of part 315. It follows, then, that service in one military department is not creditable toward completion of a probationary period in another military department. [FN7]

FN7. This holding is consistent with the definition of "agency" that appears in FPM Supplement 296-33, entitled "The Guide to Processing Personnel Actions." Under that definition, "Departments of Army, Navy, and Air Force are considered to be individual agencies for the purposes of this supplement." FPM Supplement 296-33, subch. 35 (1991). See also Brown v. Department of the Navy, 53 M.S.P.R. 537, 542-543 (1992) (the Rehabilitation Act of 1973 does not require the Department of the Navy to accommodate its employees by placing them in positions outside that department). In addition, because the personnel functions of the Department of the Navy are separate from the personnel functions of the other military departments, the "same agency" definition set forth at FPM ch. 315, appendix A, s A-3c(2) does not apply here.

[3] In light of this congressional judgment, we find here that the appellant's service in the Department of the Army cannot be credited toward completion of the probationary period she began when she was appointed by the Department of the Navy, and that the appellant therefore had not completed her probationary period when the latter agency separated her. For these reasons, the appellant is not an "employee" under 5 U.S.C. § 7511(a)(1), and she is thus not entitled to appeal her separation to the Board under 5 U.S.C. § 7513(d). Instead, any appeal right she might have would arise under 5 C.F.R. part 315, which governs the rights of employees separated during their probationary periods. Because the appellant was separated for unsatisfactory performance during her probationary period, she is entitled to appeal to the Board only if she raises a non-frivolous allegation that her separation was based on partisan political reasons or marital status. See 5 C.F.R. §§ 315.804, 315.806; Von Deneen v. Department of Transportation, 33 M.S.P.R. 420, 422, aff'd, 837 F.2d 1098 (Fed.Cir.1987) (Table); Ceraso v. Department of the Army, 3 MSPB 180, 3 M.S.P.R. 63, 64 (1980). Because the appellant raised no such allegation, we agree with the administrative judge that the Board lacks jurisdiction over this appeal.

Note 1. A simple rule to follow in probationer cases is that all employees (with limited exceptions) appointed from a civil service register must serve a new probationary period. 5 C.F.R. § 315.801(a)(1). This rule applies even when an employee has successfully completed a probationary period and is later appointed from a register to a substantially similar position or to a position in the same job series at a higher grade. Arispe v. Dept. of Air Force, 43 M.S.P.R. 96 (1990). For an excellent review of the probationary period applicable to excepted service employees under the Civil Service Due Process Amendments of 1990, see Todd v. Merit Systems Protection Board, 55 F.3d 1574 (Fed. Cir. 1995) (holding that employees whose rights were not specifically addressed by the Act were not affected by its provisions). *See also* Anderson v. Merit Systems Protection Board, 12 F.3d 1069 (Fed. Cir. 1993), *cert. denied,* 114 S.CT. 2673 (1994)(holding that temporary employees not covered by the Due Process Amendments could not establish MSPB jurisdiction by estoppel).

Note 2. The probationary period ends at the completion of the last duty period on the day before the anniversary date of appointment. An employee given notice of removal on the last

duty day of the probationary period has, therefore, completed the probationary period and the removal is defective. Stanley v. Dep't of Justice, 58 M.S.P.R. 354 (1993); Dagstani v. Dep't of Housing and Urban Dev., 15 M.S.P.R. 700 (1983). This is true because the personnel action does not become effective until midnight of the date the action is taken. Toyens v. Dep't of Justice, 58 M.S.P.R. 634 (1993); Shannon v. Dep't of Air Force, 19 M.S.P.R. 510 (1984). To ensure proper termination of a probationer, make the removal effective at least several business days before the anniversary date of appointment.

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b. Probationary Period for Newly-Appointed Supervisors. Newly-appointed supervisors and managers must also serve a probationary period. The purpose of this probationary period is to test the managerial and supervisory skills of the employee. Under 5 C.F.R. § 315.905, each agency is entitled to determine an appropriate length for this probationary period, and it may vary among different occupations. The Army has chosen to use a one-year period in all cases unless a special exception is granted. See AR 690-300, ch. 315.9.

A manager who fails to complete satisfactorily the probationary period must be reassigned to a position no lower in grade than the lower of the supervisory position currently occupied or the position occupied before taking the supervisory position. 5 C.F.R. § 315.907. There is generally no appeal right upon return to the nonsupervisory position, 5 C.F.R. § 315.908, and the reassignment may not be grieved under the Department of Defense grievance procedure (adopted by 18 March 1994 memorandum and succeeding in the Army AR 690-700, Chapter 771-1).

c. Tenure upon appointment: career-conditional status. Immediately upon appointment to a competitive service position, an appointee is both a probationary employee and a career-conditional employee. The employee automatically becomes a career employee upon completion of the service requirement established by OPM. The Office of Personnel Management normally requires a three-year period of substantially continuous creditable service to become a career employee. See generally 5 C.F.R. Part 315 for a discussion of career employment.

This "career" status provides the employee with higher retention standing in a reduction-in-force. In a reduction-in-force, a career employee will always be retained over a career conditional employee in the same type job. A detailed discussion of the reduction-in-force process is provided later in this book.

d. Summary of employee status in the competitive service. Upon appointment to a competitive service position, an appointee is normally a probationary career-conditional employee. After one year, the employee becomes a nonprobationary, career-conditional employee. Finally, after three years, the employee is a nonprobationary career employee. OPM has proposed various adjustments to this scheme of career progression; however, as of the date of publication of this text, no rules have been adopted.

2.4 Pay Systems for Federal Employees. Federal civil service employees are categorized not only by their status as competitive or excepted service employees, but also by their category of

pay. This section will review the principal categories of employees by pay systems and focus on how pay is determined for each category of employee.

a. General Schedule Employees. The General Schedule consists of the Government's white collar workers. The pay levels and timing of pay increases for Federal General Schedule (GS) employees are prescribed by statute. See 5 U.S.C. Chapter 53, subchapter III. The General Schedule consists of fifteen (GS-1 through GS-15) with ten steps per pay grade. Employees progress through the ten steps per pay grade after completion of specified waiting periods and performance at an acceptable level of competence.

There were formerly eighteen grades; however, the "supergrades," GS-16 through GS-18, have been converted to positions in the Senior Executive Service (SES). SES employees are governed by separate statutory provisions and are beyond the scope of this book. See 5 U.S.C. Chapter 31, subchapter II and Chapter 53, subchapter VIII.

(1) General schedule pay.

General Schedule employees are compensated on the basis of the General Schedule at 5 U.S.C. § 5332. There is generally no consideration of local rates of pay for their type of work in the civilian sector in the geographic area in which they are employed. Under the Federal Employees Pay Comparability Act of 1990, however, a locality comparability payment for GS employees adds a specific percentage differential, or "locality pay," based on Bureau of Labor Standards geographic area surveys of non-Federal employers. The Federal Employees Pay Comparability Act of 1990 also included several important provisions to narrow the pay gap between private sector and public sector employee salaries. Beginning in FY 1992, GS pay raises have been based on the annual rate of increase in employment costs for the U.S. labor force. This index is called the Employment Cost Index (ECI). The ECI is tied to labor costs and not cost of living increases. Under the Act, the President may limit the annual raise to 5% if the ECI exceeds 5% or cancel the raises if there is a state of war or severe economic conditions. See 5 U.S.C. §§ 5301-5307. The exact amount of the Pay Comparability adjustment has been an annual source of heated debate in Congress. The President has agreed to a .6% increase in locality pay for fiscal year 1995, which is more than 1% lower than would be required by the ECI. A similar reduction for FY 1996 appears imminent.

The General Schedule closely resembles the pay tables familiar to military personnel. There are 15 possible grades within the General Schedule (exclusive of the Senior Executive Service) and within each grade there are ten steps for pay increases based on longevity. There are two significant distinctions, however, between the Military Pay Schedule and the General Schedule. First, a civilian employee's grade depends upon the position in fact occupied and is not a personal attribute of the employee, as is the case with military personnel (SES grades are, however, personal to the individual). For example, a Captain will be paid a Captain's salary regardless of the duties performed. A civilian employee, on the other hand, has no personal right to the grade assigned to the position occupied. The grade belongs to the position rather than the individual. A civilian attorney working in a judge advocate office in Germany may fill a GS-13 position, therefore, but will, in effect, be demoted to a GS-12 rating upon return to the U.S. if that is the grade of the position to which the employee has return rights. The second distinction

between the Military Pay Schedule and the General Schedule is that a civilian employee is not necessarily guaranteed a within-grade longevity increase, commonly referred to as a step increase. The statutory standard requires an employee to perform at an "acceptable level of competence" to receive a within grade increase. See 5 U.S.C. § 5335(a). Supervisors may withhold these increases from employees who have not performed satisfactorily during the rating period. The procedures to deny an employee a within-grade step increase will be discussed later in this book.

(2) Performance Management and Recognition System employees.

The Civil Service Reform Act of 1978 established the Merit Pay System, codified at 5 U.S.C. Chapter 54. The Performance Management and Recognition System (PMRS), created by Title II of the Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. 98-615) (also codified at 5 U.S.C. Chapter 54), later replaced the merit pay rules. This system applied to supervisors and managers in pay grades GS-13 through GS-15, designated GM-13 through GM-15, and tied their pay in part to their performance. After temporarily extending the system several times, Congress finally abolished the PMRS by Public Law 103-89, Sep. 24, 1993. Former GM employees will be converted to equivalent GS grades.

b. Prevailing rate employees. Prevailing rate employees are the blue collar workers in the civil service. The statutory definition of prevailing rate employee is at 5 U.S.C. § 5342(a)(2). Included are employees in recognized trades or crafts or other skilled mechanical crafts, or in unskilled, skilled, or semi-skilled manual labor occupations, including supervisors and foremen. The Office of Personnel Management and Department of the Army have separate regulations applicable to prevailing rate employees, although their rights and obligations are substantially similar to those of general schedule employees. The distinguishing characteristic of prevailing rate employees, sometimes referred to as "wage board" or "wage grade" employees, is how their pay is calculated. Wage grade pay is based on the prevailing rate of pay for a particular occupation within the private sector in the geographic area of employment. The United States is divided into over 100 wage board areas for purposes of computing prevailing rates. The Office of Personnel Management has overall responsibility for supervising the manner in which these prevailing rates are computed, but it has delegated its authority to a "lead agency" for each of the areas. 5 U.S.C. § 5343. This lead agency must conduct an annual survey of the rates of compensation within its area and promulgate pay schedules based on the survey. The schedules so derived are binding on all Federal agencies within that wage board area. In conducting the annual survey, the lead agency will appoint an agency wage committee consisting in part of representatives of management and employees or their unions. This committee is entitled to call upon the Department of Labor's Bureau of Labor Statistics for professional advice and logistical support in conducting the annual survey.

Like the GS employees, prevailing rate employees also receive periodic step increases based on completion of designated waiting periods and satisfactory performance. The regulatory guidelines for prevailing rate employees are at 5 C.F.R. Part 532.

c. Other Civilian Employees. Not all civilians working at Army installations are legally employees of the United States. Many of them are not covered by the rules and regulations

promulgated by the Office of Personnel Management. Employees of nonappropriated fund instrumentalities (NAFI), such as the post exchange, the Army and Air Force Motion Picture Service, and the Officer or NCO clubs, for example, are not covered by the Federal personnel regulations of the Office of Personnel Management. See 5 U.S.C. ' 2105(c). Although a nonappropriated fund instrumentality may, for some purposes, be an instrumentality of the United States, for most purposes its employees are not considered employees of the United States. They are, rather, employees of the particular nonappropriated fund instrumentality that employees them. NAFI employees often receive far less due process protection than their appropriated fund counterparts and will never have appeal rights to the MSPB.

There are also numerous employees of independent organizations on military installations. These employees are neither Department of the Army employees nor nonappropriated fund employees. Examples of such individuals are those employed by the Red Cross, the United Service Organizations, Inc. (USO), the local credit union, the Boy Scouts or Girl Scouts, a PX concessionaire, or contractor employees. None of these employees are entitled to the protections and benefits of a civil service employee.

2.5 Classification of Positions

a. General. A Federal civilian employee's pay depends on the level or "grade" of the position the employee occupies. This grade is determined by a process called "classification." This section will outline how positions are classified, what employees can do to get their positions reclassified, and the extent to which courts will get involved in classification issues.

Under the Classification Act of 1949, the Office of Personnel Management is responsible for analyzing various positions in the Federal civil service and grouping them according to their relative responsibility, difficulty, and qualification requirements. The purpose of the Classification Act is to insure that all employees in the Federal Government receive equal pay for equal work, regardless of which agency employs them. See 5 U.S.C. § 5101 for Congress' statement of policy on classification.

To accomplish this purpose, Congress directed OPM to prepare classification standards for use in analyzing and grouping positions. The required content of these standards and the method for classifying positions are described in 5 U.S.C. §§ 5105-5112.

b. The classification process. The Office of Personnel Management must establish standards for placing positions in appropriate classes and grades. 5 U.S.C. § 5105. The standards for grading positions within all classes of jobs must be consistent with the broad guidelines for grading in 5 U.S.C. § 5104, which define in general terms the level of responsibility associated with each grade.

Using the standards established by OPM, individual agencies then classify each of their positions into the proper job series and grade. To insure proper classification of positions under the OPM standards, OPM conducts periodic audits of agency classification actions.

c. Employee appeals. An employee's pay is based upon the classified grade of the position; the classification process is, therefore, often challenged--particularly if an employee's position has been "downgraded" or reduced in grade. Employees may, at any time, appeal the classification of their positions within their agency or to OPM. A classification appeal may challenge only the appropriateness of the grade for the position or the wage system determination, the General Schedule or the prevailing wage system. Employees may not challenge the accuracy of their job description or OPM's classification standards.

An employee may challenge a classification determination at any time, but any relief granted is only prospective. An appeal decision for the employee will award retroactive relief only in cases involving a downgrade or other action that wrongfully reduced the employee's pay, and then only if the appeal is initiated within 15 days of the effective date of the reduction. Relief is otherwise prospective only. See 5 C.F.R. § 511.703. The appeal decision made by OPM is final and binding the agency.

d. Judicial review of classification decisions. Once an employee exhausts the administrative appeal to OPM, judicial review of the classification decision is difficult to obtain. A request for judicial review of the decision raises several interesting legal questions: (1) when, if ever, can the OPM reconsider its "final" decision; (2) in which court and on what theory should the aggrieved employee sue; and (3) can a court award back pay as a remedy for an improper classification.

The courts have generally held that classification decisions are nonreviewable. *See, e.g.*, Karamanos v. Egger, 882 F.2D 447 (9th Cir. 1989) (finding that misclassifications are prohibited personnel actions and must be processed as such under the Civil Service Reform Act); Barnhart v. Devine, 771 F.2d 1515 (D.C. Cir. 1985). The Supreme Court addresses these issues in the Testan case below.

United States v. Testan, 424 U.S. 392 (1976)

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This is a suit for reclassification of Federal civil service positions and for backpay. It presents a substantial issue concerning the jurisdiction of the Court of Claims and the relief available in that tribunal.

I

The plaintiff-respondents, Herman R. Testan and Francis L. Zarrilli, are trial attorneys employed in the Office of Counsel, Defense Personnel Support Center, Defense Supply Agency, in Philadelphia. They represent the Government in certain matters that come before the Armed Services Board of Contract Appeals of the Department of Defense. Their positions are subject to the Classification Act, 5 U.S.C. § 5101 et seq., and they are presently classified at civil service grade GS-13.

In December 1969 respondents, through their Chief Attorney, requested their employing agency to reclassify their positions to grade GS-14. The asserted ground

was that their duties and responsibilities met the requirements for the higher grade under standards promulgated by the Civil Service Commission in General Attorney Series GS-905-0. In addition, they contended that their duties were identical to those of other trial attorneys in positions classified as GS-14 in the Contract Appeals Division, Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Dayton, Ohio, and that under the principle of "equal pay for substantially equal work," prescribed in § 5101(1)(A), they were entitled to the higher classification.

The agency, after an audit by a position classification specialist, concluded that the respondents' assigned duties were properly classified at the GS-13 level under the Commission's classification standards. On appeal, the Commission reached the same conclusion and denied reclassification. The Commission also ruled that comparison of the positions held by the respondents with those of attorneys employed by the referenced Logistics Command was not a proper method of classification.

. . . .

We granted certiorari because of the importance of the issue in the measure of the Court of Claims' statutory jurisdiction, and because of the significance of the court's decision upon the Commission's administration of the civil service classification system. 420 U.S. 923 (1975).

II

We turn to the respective statutes that are advanced as support for the action taken by the Court of Claims.

A. The Tucker Act.

. . . .

[The Court concludes that the Tucker Act merely confers jurisdiction on the Court of Claims in certain cases but does not create a substantive right to recover money damages from the U.S. for a period of wrongful classification.]

B. The Classification Act. Inasmuch as the trial judge proposed, App. 57, that the respondents were not entitled to backpay under the Back Pay Act, 5 U.S.C. § 5596, and the Court of Claims held that there was no need for it to reach and construe that Act, . . . it is implicit in the court's decision in favor of respondents that a violation of the Classification Act gives rise to a claim for money damages for pay lost by reason of the allegedly wrongful classifications.

. . . .

[The Court discusses sovereign immunity, stating that a waiver of sovereign immunity must be unequivocal. Absent such a waiver, the Court of Claims has no jurisdiction to hear a suit against the U.S.]

We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. § 5101(1)(A), Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for

procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified.

In answer to this fact, the respondents and the amici make two observations. They first argue that the Tucker Act fundamentally waives sovereign immunity with respect to any claim invoking a constitutional provision or a Federal statute or regulation, and makes available any and all generally accepted and important forms of redress, including money damages. It is said that the Government has confused two very different issues, namely, whether there has been a waiver of sovereignty, and whether a substantive right has been created, and it is claimed that where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation.

The argument does not persuade us. As stated above, the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. . . . In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument of amici that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation.

. . . .

The respondents and the amici next argue that the violation of any statute or regulation relating to Federal employment automatically creates a cause of action against the United States for money damages because, if this were not so, the employee would then have a right without a remedy, inasmuch as he is denied access to the one forum where he may seek redress. Here again we are not persuaded. Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the Federal claim--whether it be the Constitution, a statute, or a regulation--does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." Eastport S. S. Corp. v. United States, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009. We see nothing akin to this in the Classification Act or in the context of a suit seeking reclassification.

The present action, of course, is not one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. United States v. Wickersham, 201 U.S. 390 (1906). There is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have been, but was not, appointed. The established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. United States v. McLean, 95 U.S. 750 (1878); Ganse v. United States, 180 Ct. Cl. 183, 186, 376 F.2d 900, 902 (1967). The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.

. . . .

The situation, as we see it, is not that Congress has left the respondents remediless, as they assert, for their allegedly wrongful civil service classification, but that Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification. There is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other. See Edelman v. Jordan, 415 U.S. 651 (1974). Respondents, of course, have an administrative avenue of prospective relief available to them under the elaborate and structured provisions of the Classification Act. . . . Among the Act's provisions along this line are those requiring the Civil Service Commission to engage in supervisory review of an agency's classifications, and, where necessary, to review and reclassify individual positions, 5 U.S.C. § 5110; allowing the Commission to reclassify, § 5112; and allowing the Commission even to revoke or suspend the agency's authority to classify its own positions, § 5111. Indeed, as the amici describe it: "[T]he Act is not merely a hortatory catalogue of high principles." Brief for Amici Curiae 15. The built-in avenue of administrative relief is one response to these statutory requirements. Review and reclassification may be brought into play at the request of an employee. 5 U.S.C. § 5112(b). And respondents, as has been noted, did just that. A second possible avenue of relief--and it, too, seemingly, is only prospective--is by way of mandamus, under 28 U.S.C. § 1361, in a proper Federal district court. In this way, also, the respondents have asserted their claims. See n. 5, supra.

The respondents, thus, are not entirely without remedy. They are without the remedies in the Court of Claims of retroactive classification and money damages to which they assert they are entitled. Additional remedies of this kind are for the Congress to provide and not for the courts to construct.

Finally, we note that if the respondents were correct in their claims to retroactive classification and money damages, many of the Federal statutes--such as the Back Pay Act--that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

The Court of Claims, in the present case, sought to avoid all this by its remand to the Civil Service Commission for further proceedings. . . . The remand statute, Pub. L. 92-415, 86 Stat. 652, now codified as part of 28 U.S.C. § 1491 (1970 ed., Supp. IV), authorizes the Court of Claims to "issue orders directing restoration to . . . position, placement in appropriate duty . . . status, and correction of applicable records" in order to complement the relief afforded by a money judgment, and also to "remand appropriate matters to any administrative . . . body" in a case "within its jurisdiction." The remand statute, thus, applies only to cases already within the court's jurisdiction. The present litigation is not such a case.

. . . .

C. The Back Pay Act. This statute, which the Court of Claims found unnecessary to evaluate in arriving at its decision, does not apply, in our view, to wrongful-classification claims. The Act does authorize retroactive recovery of wages whenever a Federal employee has "undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of" the compensation to which the employee is otherwise entitled. 5 U.S.C. § 5596(b). The statute's language was intended to provide a monetary remedy for wrongful

reductions in grade, removals, suspensions, and "other unwarranted or unjustified actions affecting pay or allowances [that] could occur in the course of reassignments and change from full-time to part-time work." S. Rep. No. 1062, 89th Cong., 2d Sess., 3 (1966). The Commission consistently has so construed the Back Pay Act. See 5 C.F.R. § 550.803(e) (1975). So has the Court of Claims. See Desmond v. United States, 201 Ct. Cl. 507, 527 (1973).

For many years Federal personnel actions were viewed as entirely discretionary and therefore not subject to any judicial review, and in the absence of a statute eliminating that discretion, courts refused to intervene where an employee claimed that he had been wrongfully discharged. . . . Relief was invariably denied where the claim was that the employee had been denied a promotion on improper grounds. See Keim v. United States, 177 U.S., at 296; United States v. McLean, 95 U.S., at 753.

Congress, of course, now has provided specifically in the Lloyd-LaFollette Act, 5 U.S.C. § 7501, for administrative review of a claim of wrongful adverse action, and in the Back Pay Act for the award of money damages for a wrongful deprivation of pay. But Federal agencies continue to have discretion in determining most matters relating to the terms and conditions of Federal employment. One continuing aspect of this is the rule, mentioned above, that the Federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.

. . . .

III

We therefore conclude that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications. This makes it unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency.

The Court of Claims was in error when it remanded the case to the Civil Service Commission for further proceedings. . .

Note. The role of the Civil Service Commission discussed in Testan is now performed by OPM. Although the Civil Service Reform Act replaced the appeal rights in the Lloyd-Lafollette Act, the substantive analysis of the employee's right to review in Testan is still valid today.

2.6 Promotion of Federal Employees.

a. Statutory Requirements. Unlike employees of civilian enterprises, who may be promoted by receiving more pay and increased responsibility within the same position, Federal employees normally must change positions to be promoted. Because a Federal position is

classified at a certain fixed level under the Classification Act, the incumbent of that position cannot move to a higher grade level while occupying that position. It is the position, not the status or experience of the employee, that determines the grade and pay level. Only if the duties and responsibilities of the position increase can the position be reclassified and possibly upgraded.

The Federal civil service is based on merit principles. A competitive service employee may therefore have to take a competitive examination to qualify for promotion to a higher graded position, unless the employee is somehow exempt from the examination requirement. See 5 U.S.C. § 3361.

b. Regulatory Implementation. A major exemption from the examination requirement is for Federal employees who have competitive status. Competitive status is acquired by completion of a probationary period under a career-conditional or career appointment. An individual with competitive status may be promoted without open competitive examination, subject to conditions prescribed by civil service rules and regulations. See 5 C.F.R. § 212.301. OPM rules limit such promotions to employees in positions covered by a clearly defined merit promotion plan. See 5 C.F.R. § 335.103.

The result of this OPM rule has been the adoption by all Federal agencies of merit promotion plans. Part 335 of 5 C.F.R. describes the minimum requirements for these plans, including such things as the types of positions covered, the use of minimum qualification standards, the methods for locating candidates, the requirements for training programs, and the maintenance of records. The plans must also define an area of consideration within which eligible candidates will be sought for job vacancies. Each plan must contain a method for evaluating eligible candidates to identify those "highly qualified" for the position. This is generally accomplished by comparing the qualifications of the eligible candidates to the requirements of the job. After the highly qualified candidates are identified, they must be further evaluated to determine which of them are "best qualified" for the position. Up to ten of those best qualified for the position are then certified to the selecting official, who decides which, if any, candidate will fill the vacant position. Department of the Army implementation is at AR 690-300, Chapters 335 and 335-1.

Such a promotion system rewards eligible employees already employed by an agency by insuring their consideration for job vacancies at equal or higher grades in that agency. Merit promotion plans also ensure that promotions within agencies are based on merit principles rather than favoritism, nepotism, or some other nonmerit factor. Most importantly for the agencies, merit promotion plans provide the agency flexibility by enabling supervisors to fill vacancies without going through the cumbersome competitive procedures using OPM registers for selection of outside candidates.

An alternative to the merit promotion system considered in the "Reinventing Government" proposals involves pay or grade banding. Under this system, employees would be classified into a broad pay or grade "band" instead of into a specific pay grade. These bands would cover the equivalent of two, three, five, or more grade equivalents; the over $20,000. would separate the highest and lowest pay in a band. Instead of seeking an upgrade in grade classification for an employee, management would have authority to simply escalate the employee on the pay band--

up to the band maximum. Since this is an exception to GS pay, however, it requires specific authority from Congress.

c. Judicial Review of Promotion Decisions. The merit promotion system often inevitably results in many qualified candidates for promotion being passed over, or nonselected, for a position. Nonselected employees have often attempted to challenge the selection decision in Federal court. These nonselectees have alleged various defects in the process: improper notice of vacancy, lack of detail concerning qualifications, use of improper procedures, consideration of ineligible employees, or discrimination.

Historically Federal courts have reviewed such claims. Accord, Latimer v. Dep't of Air Force, 657 F.2d 235 (8th Cir. 1981); Estes v. Spence, 338 F. Supp. 319 (D.D.C. 1972). The Court of Appeals for the D.C. Circuit has often refused to review such nonconstitutional claims. Williams v. Internal Revenue Serv., 745 F.2d 702 (D.C. Cir. 1984); Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983). The D.C. Circuit reasoned in its decisions that the Civil Service Reform Act of 1978 established a comprehensive scheme of administrative and judicial review of certain designated personnel actions; therefore, no judicial review is available for other personnel actions absent a constitutional claim.

Note. Unless the employee alleged prohibited discrimination, there has been no administrative appeal procedure for those not selected for promotion. The only basis for filing a grievance over a promotion decision was that the agency followed improper procedures. The former 5 C.F.R. § 771.108 addressed agency grievance coverage and specifically excluded from grievance coverage "[n]onselection for promotion from a group of properly ranked and certified candidates." OPM has recently repealed this provision. *See* 60 Fed. Reg. 47039-01 (Sep. 11, 1995). The DOD Grievance process, at para. 13-1.d.2(a) also excludes nonselection for promotion.

2.7 Incentive Awards.

Employees may also be eligible for cash incentive awards under 5 U.S.C. Chapter 45. This chapter provides the authority for paying employees cash awards up to $25,000 for suggestions, inventions, superior accomplishments, or other meritorious efforts deserving recognition. An award may be either an agency award or (in exceptional circumstances) a Presidential award.

The Office of Personnel Management regulations in 5 C.F.R. Part 451 provide a broad framework within which Federal agencies may design and operate their own incentive award programs. Agency plans must, however, be reviewed by OPM for compliance with the regulatory requirements. See 5 C.F.R. § 451.106.

Army Regulation 672-20 provides for a variety of incentive awards: suggestion awards, invention awards, special act or service awards, merit step increases, sustained superior performance awards, public service awards, length of service recognition, and other honorary awards and recognition devices. Portions of this regulation are also applicable to military personnel; however, the principal purpose of this regulation is to implement the statutory provisions for incentive awards for Federal civilian employees. The regulation contains all of the

criteria concerning eligibility and approval authority for each of the various types of awards. All decisions on performance awards, honorary awards, and employee suggestions and inventions are management discretionary decisions and are not grievable under the DOD grievance procedures. (See para 13-1d(2)(a).)

CHAPTER 3

EMPLOYEE GRIEVANCES UNDER AGENCY GRIEVANCE PROCEDURES

3.1 Purpose of Agency Grievance Procedure.

Prior civil service regulations required each Federal agency (including the executive agencies and military departments) to establish and maintain an agency grievance procedure. OPM has abolished this requirement in its amendment of 5 C.F.R. Part 771. *See* 60 Fed. Reg. 47039 (Sep. 11, 1995). Agencies must maintain the grievance systems already in place under the old Part 771 until the agency's grievance process is appropriately modified or revised.

An agency grievance process serve a variety of purposes. First, it provides a legitimate outlet for an employee to complain about management practices. Second, it allows an employee to obtain review of personnel actions from which there is no statutory appeal right. An employee who receives a letter of reprimand or a 3-day suspension, for example, has no right to appeal the agency action. The employee may, however, file a grievance to obtain limited review of the action. Third, the grievance procedure may provide a forum for challenging some aspect of the employee's working conditions, relationships, or status that is not covered by some other statutory or regulatory procedure. The agency grievance procedures encourage orderly consideration and prompt resolution of employee concerns and dissatisfactions. Management can consider each grievance fairly, equitably and promptly.

3.2 Regulatory Requirements.

Each Federal agency can now establish a grievance system for its employees without complying with the requirements of former 5 C.F.R. Part 771. The regulation requires only that agencies maintain current systems until an new grievance process--preferably on implementing alternate dispute resolution techniques--is fully implemented.

5 C.F.R. Part 771 -- Agency Administrative Grievance System.

§ 771.101 Continuation of Grievance Systems.

Each administrative grievance system in operation as of October 11, 1995, that has been established under former regulations under this part must remain in effect until the system is either modified by the agency or replaced with another dispute resolution process.

Note. Establishment of time limits in grievance procedures is within the discretion the agency and, therefore, are not subject to judicial review. Campbell v. Department of Air Force, 755 F. Supp. 902 (E.D. Cal. 1991).

3.3 The Department of Defense Grievance System.

a. General. The Department of Defense established a new Agency Grievance System (AGS) for all DOD military departments through an 18 March 1994 memorandum by Mr. Ronald P. Sanders, the Principal Director to the Assistance Secretary of the Army for Civilian Personnel Policy. It modified this process through publication of DOD 1400.25-M on 20 December 1995 to implement the OPM changes. The Army published implementing instructions for the new DOD process by a 13 February 1996 memorandum from the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs. All matters are excluded under the DOD Grievance System that were excluded by the old 5 C.F.R. § 771.105(b) or are not personal to the employee or the employee's personal well being or career.

b. Procedure. The DOD AGS contains only two steps, compared to the former three step process in AR 690-600, chap. 771. The employee has the initial option of engaging in informal resolution to a problem through problem-solving. The employee presents the problem to a first or second line supervisor either orally or in writing within 15 days of the event giving rise to the problem. The 15 days runs from the time the employee becomes aware of the event or should have become aware of it. The supervisor has 30 days (which in no event can be extended beyond 60 days) to resolve the problem or inform the employee that no resolution is possible.

If the grievance is not resolved during problem-solving, or the employee elects to bypass that stage, the employee files a formal, written grievance with a designated deciding official within 15 days. This deciding official must be at least a second-line supervisor, and will often be a chief of staff or deputy commander. The deciding official must be higher graded than any employee having a direct interest in the outcome of the grievance (except heads of activities or installations). The grievance must state specific dates, facts, and witnesses involved in the problem. The deciding official decides whether and how to investigate the grievance, approves or disapproves a representative for the grievant, and determines the appropriate amount of official time to be allowed for preparation and presentation of the grievance. Investigation can be conducted by the Office of Complaints Investigation on a cost-reimbursable basis, by an uninterested investigator within the command, or other means. The deciding official then issues a written, final decision within 60 days. There is no appeal or review of the deciding official's determination on the grievance.

CHAPTER 4

EMPLOYEE DISCIPLINE

SECTION I: Authority and Procedure

4.1 Introduction. Management's a ability to take effective disciplinary action is critical to maintaining a well-disciplined work force, whether in the private sector or in the Federal civil service. To attain this goal in the civil service system, we must understand what disciplinary tools are available, what procedures must be followed to impose the various types of disciplinary actions, and what circumstances permit us to legally impose discipline. This section will examine the various types of disciplinary actions available to Federal supervisors, the procedures they must employ to impose each of these actions, and the employee's predecisional and postdecisional due process rights.

The ultimate goal of a disciplinary system is to motivate employees to conform to acceptable standards of conduct. A supervisor's best means for maintaining discipline is through cultivation of a positive work environment and good relations with subordinates. When an employee fails to conform to expected standards, the supervisor must take appropriate remedial action.

4.2 Types of Disciplinary Action.

a. General. Disciplinary tools available to Federal managers range from counseling to removal. The Army's regulation on civilian employee discipline, AR 690-700, Chapter 751, establishes two categories of disciplinary actions. The first category, informal disciplinary actions, includes oral admonishments and written warnings. The second category, formal disciplinary actions, includes letters of reprimand, suspensions, reductions in grade or pay, and removals. Informal action is encouraged as a first step in constructive discipline for behavioral offenses, but management can impose formal disciplinary for a first infraction whenever appropriate. See AR 690-700, Chapter 751, paragraph 1-3.

b. Informal disciplinary actions. Oral admonishments or counseling and warning letters are actions usually taken by the first or second line supervisor. An informal, oral action should always be noted on the employee's Standard Form 7-B (Employee Record Card) and explained in a corresponding memorandum for record. AR 690-700, Chapter 751, paragraph 1-3b.

c. Formal disciplinary actions. Formal disciplinary actions are initiated by the supervisor in the Army, but they must be coordinated with the servicing civilian personnel office (CPO) and reviewed by the Labor Counselor.

(1) Written reprimands. Written reprimands may be imposed by a supervisor and are included in the employee's official personnel file (OPF). The supervisor imposing the discipline decides how long the reprimand will remain in the employee's OPF, but the period may

not exceed three years. The letter of reprimand will automatically be removed from the employees' file if the employee changes positions and the new position is serviced by a different civilian personnel office.

(2) Suspensions. Suspensions are divided into two categories based on their duration: suspensions for fourteen days or less, and suspensions for more than fourteen days. The procedural rights an employee receives depends on the duration of the suspension. The suspension is measured in calendar days, not workdays. For employees working a normal tour of duty, Monday through Friday, a 14-day suspension amounts to a 10-workday suspension. 5 C.F.R. §§ 752.201(d)(1); 752.402(a).

There is no specific limit on the duration of a suspension; however, a suspension generally cannot be indefinite. See, e.g., Tigner-Kier v. Department of Energy, 20 M.S.P.R. 552 (1984). The courts recognize a type of "indefinite" suspension that is linked to the disposition of criminal changes. Such a suspension is not truly indefinite because it is limited by a condition subsequent--the outcome of criminal proceedings. This type of action is discussed fully in paragraph 4.12 of this chapter. Regardless of its length, a suspension results in the employee not reporting to work and not being paid for the period of suspension. See 5 C.F.R. § 752.201(d)(4) ("S*uspension* means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.").

(3) Reductions in grade or pay. While reductions in grade or pay are more frequently used in performance-based actions, they may be appropriate for some misconduct problems. Most frequently, a reduction for misconduct is used to reduce a supervisor to a nonsupervisory position because of misconduct impacting on the special trust and confidence required of management personnel.

(4) Removals. The most serious disciplinary action is the removal - firing the employee.

4.3 Procedural requirements for imposing formal disciplinary actions. The procedures required to impose formal disciplinary action vary depending on the type action. As expected, the more serious the action, the more extensive the procedural protections are for the employee being disciplined.

a. Written reprimand. This is the least severe of the formal disciplinary actions and the easiest to impose. A supervisor obtains all reasonably available and relevant information and then determines whether a letter of reprimand is warranted. Coordination with the CPO and review by the Labor Counselor is required. Before deciding whether to impose this type discipline the supervisor may, but need not, interview the employee involved. An employee generally has no right to counsel at such an interview, but may be entitled to union representation at the interview under 5 U.S.C. § 7114(a)(2)(B) if the employee is in a collective bargaining unit. See AR 690-700, Chapter 751, paragraph 3-2, for more detailed guidance, including instructions on the content of a letter of reprimand.

b. Suspensions for 14 days or less. The statutory basis for these disciplinary actions is 5 U.S.C. §§ 7501-7504. This law and its implementing regulations contain significant predecisional, procedural due process requirements; however, these procedures apply only to nonprobationary competitive service employees. Excepted service employees, even those who are preference eligibles or have two or more years current, continuous service, may be summarily suspended for 14 days or less. Bredehorst v. United States, 677 F.2d 87 (Ct. Cl. 1982) (at the time of the disciplinary action in Bredehorst, the critical length for suspensions was 30 days instead of the current 14 days).

Nonprobationary competitive service employees receive the following procedural due process (see 5 U.S.C. § 7503; 5 C.F.R. § 752.404) before a suspension for 14 days or less may be imposed:

1. advance written notice specifying the reasons for the proposed action;

2. the right to review all the material and information relied upon by management in support of the proposed action;

3. the right to reply, orally and in writing, to the charges;

4. the right to representation during this process; and

5. the right to a final written decision, specifying the reasons for the action, prior to the effective date of the action.

The right to review all the information relied upon by management in proposing this action does not include questioning the agency officials involved. Such a right exists only during the appeals process to the Merit Systems Protection Board for those actions appealable to the board. See paragraph 5.4 for a discussion of these appellate rights and Chapter 8 for a discussion of employee rights during the appellate process.

c. True adverse actions. Suspensions for more than 14 days, reductions in grade or pay, and removals are often referred to as true adverse actions. The procedures leading to the imposition of true adverse actions are very similar to those required for suspensions for 14 days or less. The differences lie in the types of employees who receive the procedural protections, in the amount of time given to the employee to respond to the proposed action, and in appeal and grievance rights.

Nonprobationary competitive service employees and nonprobationary excepted service employees (preference eligibles with over one year service and nonpreference eligible excepted service employees with two or more years of current, continuous service) all receive the same predecisional due process in a true adverse action. Most excepted service employees now receive due process because of the definition of employee in 5 U.S.C. § 7511, which is broader than the definition of employee for the lesser suspensions found at 5 U.S.C. § 7501. The Civil

Service Due Process Amendments modified this definition to grant most excepted service employees due process rights in true adverse actions.

Despite these rights for the "protected" employees, agencies still have virtual summary disciplinary authority over nonpreference eligible excepted service employees with less than two years current, continuous service and probationary competitive service or excepted service preference eligible employees. See, e.g., Forest v. Merit Systems Protection Bd., 47 F.3d 409 (Fed. Cir. 1995) (nonpreference eligible excepted service employee with less than two years of current, continuous employment in a nontemporary appointment has no right of appeal from removal); Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980); Shaw v. United States, 622 F.2d 520 (Ct. Cl.), cert. denied, 449 U.S. 881, reh'g denied, 449 U.S. 987 (1980); Ferguson v. Dep't of Interior, 59 M.S.P.R. 305 (1993); and Horton v. Dep't of Navy, 60 M.S.P.R. 397 (1994).

An employee entitled to due process in a true adverse action receives at least thirty days advance written notice of the action and at least seven days to prepare matters in response to the proposed action. See 5 U.S.C. ' 7513(b)(1). If the agency has reasonable cause to believe the employee has committed a crime for which imprisonment may be imposed, the advance notice period may be reduced to 7 days under the "crime provision." See 5 U.S.C. § 7513(b)(1) and 5 C.F.R. § 752.404(a)(1). Regardless of the length of the notice period, the employee is normally in a full duty status during the notice period. See 5 C.F.R. § 752.404(b)(3) for alternatives to normal duty status during the notice period, including placing the employee in a paid nonduty status for the entire notice period.

Title 5, U.S. Code, section 7513(c) provides for an optional predecisional hearing in true adverse actions. The Army, however, has elected not to provide predecisional hearings.

4.4 Appeal and grievance rights. After management has provided an employee predecisional due process and decided to take disciplinary action, the employee may be entitled to challenge the action through a grievance or appeal. An employee's right to grieve or appeal a disciplinary action depends on three factors: whether the employee is covered by a collective bargaining agreement, the type disciplinary action involved, and the employee's individual status.

a. Without a collective bargaining agreement.

(1) True adverse actions. An employee with status (discussed below) who is not covered by a collective bargaining agreement between management and a labor organization can appeal a true adverse action to the Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 7513(d); 5 C.F.R. § 752.405. In this appeal, the employee receives a full administrative hearing before an administrative judge of the MSPB, at which the agency has the burden of proving the propriety of the disciplinary action. See 5 U.S.C. § 7701. Details of MSPB procedures are provided in Chapter 8 of this book.

(2) Other disciplinary actions. For lesser disciplinary actions, employees generally can grieve the action under the DOD AGS. There is no third party hearing or other review outside the command in this system. The final decision on the grievance is made within command channels. Details of the DOD AGS are provided in Chapter 3 above.

There are significant differences in postdecisional appeal rights between a 14-day and 15-day suspensions; courts have, therefore, scrutinized attempts to "split" suspensions of more than 14 days into two or more lesser suspensions to limit the employee's appeal rights. Such splitting of punishments for the same offense will not defeat the employee's appeal rights. Lyles v. U.S. Postal Service, 709 F.2d 358 (5th Cir. 1983).

b. With a collective bargaining agreement. Every public sector collective bargaining agreement must contain a grievance procedure that includes an arbitration process that binds the parties. See 5 U.S.C. § 7121. Arbitration under this process provides the employee and the union a full administrative hearing outside the agency, and the arbitrator's decision in the case binds the parties in the same way as would a decision by the MSPB. For a detailed discussion of the negotiated grievance process, see The Judge Advocate General's School, U.S. Army, JA 211, Law of Federal Labor-Management Relations.

(1) True adverse actions. An employee covered by a collective bargaining agreement can either appeal a true adverse action to the MSPB or grieve the action under the negotiated grievance procedure. The employee must make a binding election; pursuit of one bars later recourse to the other procedure. Rolon v. Dep't. of Veteran Affairs, 53 M.S.P.R. 362 (1992). See 5 U.S.C. § 7121(e)(1) and 5 C.F.R. 1201.3(c)(2) for the rule regarding when the employee is held to have made an election; Jones v. Dep't. of Justice, 53 M.S.P.R. 117, dismissed, 972 F.2d 1352 (Fed. Cir. 1992)(finding employee's later withdrawal of grievance did not affect validity of election).

A employee in essence forfeits control of an appeal by electing to grieve under a negotiated grievance procedure instead of appealing to the MSPB. Rolon v. Dep't of Veterans Affairs, 53 M.S.P.R. 362 (1992). Under the negotiated grievance procedure, an employee chooses to file a grievance; however, the employee cannot invoke arbitration, only the union can do that. If the union elects not to invoke arbitration, the employee's grievance and appeal rights end. See Billops v. Dep't of the Air Force, 725 F.2d 1160 (8th Cir. 1984) and Parks v. Smithsonian Inst., 39 M.S.P.R. 346 (1988) for examples of such aggrieved employees. Of course, the employee's appeal rights are still defined by law. An employee who has no MSPB appeal rights, therefore, can not further appeal an arbitrator's decision as could a nonprobationary employee. *See* Burke v. U.S. Postal Serv., 888 F.2D 833 (Fed.Cir. 1989) (finding it had no jurisdiction over petition from arbitrator's decision by nonpreference-eligible excepted service postal worker).

(2) Other disciplinary actions. Under a collective bargaining agreement, employees can grieve the lesser disciplinary actions and potentially go to binding arbitration. This is a significant benefit to the employee; without a collective bargaining agreement the employee cannot grieve this type disciplinary action outside the agency. Do not confuse this arbitration right with the arbitrability of true adverse actions. An employee who can not appeal a true adverse action (*i.e*, probationary competitive service employees, excepted service employees with less than two years, current, continuous service) also can not arbitrate that action, and any union proposal to give those employees arbitration rights is nonnegotiable. Dep't of Health & Human Servs., v. Federal Labor Relations Auth., 894 F.2d 333 (9th Cir. 1990); Dep't of Treasury

v. Federal Labor Relations Auth., 873 F.2d 1467 (D.C. Cir.1989); Dep't of Health & Human Servs., v. Federal Labor Relations Auth., 858 F.2D 1278 (7th Cir.1988) (all reversing FLRA's finding that proposal to allow probationary employees arbitration rights was negotiable).

c. Employee status. The type of disciplinary action at issue control appeal rights, and the existence or absence of a collective bargaining agreement controls grievance rights. The employee's status, however, determines what, if any, appeal and grievance rights the employee has in any disciplinary action.

A probationary employee generally has no statutory appeal right to the MSPB. Pierce v. Government Printing Office, 95-3301 (Fed. Cir. Nov. 11, 1995); Horton v. Dep't of Navy, 60 M.S.P.R. 397 (1994); McChesney v. Dep't. of Justice, 55 M.S.P.R. 512 (1992); Stern v. Department of Army, 699 F.2d 1312 (Fed. Cir. 1983). Probationary employees also cannot arbitrate a disciplinary action. INS v. FLRA, 709 F.2d 724 (D.C. Cir. 1983).

Before passage of the Civil Service Due Process Amendments of 1990, excepted service employees who were not preference eligible had no right to MSPB or judicial review of adverse personnel actions. United States v. Fausto, 484 U.S. 439 (1988). Relying on the reasoning of Fausto, courts and the Federal Labor Relations Authority (FLRA) held such employees were similarly barred from challenging true adverse actions through negotiated grievance procedures. Department of Health and Human Services v. FLRA, 894 F.2d 333 (9th Cir. 1990); Department of Treasury v. FLRA, 873 F.2d 1467 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990); Department of Health and Human Services v. FLRA, 858 F.2d 1278 (7th Cir. 1988); NLRB and NLRB Professional Association, 35 F.L.R.A. No. 123 (1990).

Effective August 17, 1990, most Schedule A and Schedule B excepted service employees with two or more years of current, continuous service became entitled to an MSPB appeal in true adverse actions. These employees are now able to arbitrate lesser disciplinary actions and have the option of appealing or grieving true adverse actions once they have satisfied this probationary period. See 60 Fed. Reg. 36 (Feb. 23, 1995) for the current list of excepted service Schedules A and B published by OPM. As noted above, however, these employees may not arbitrate true adverse actions unless they could otherwise appeal that action to the MSPB.

4.5 Procedural rights for probationary and excepted service employees in disciplinary actions. Probationary competitive service and probationary veteran's preference excepted service employees receive little due process in disciplinary actions--even true adverse actions. They are, however, entitled by law to some protections.

a. Probationary employee rights. The basis of the action determines, what, if any, process is due a probationary employee.

(1) Predecisional rights. In removals based on conduct or performance during the probationary period, a probationary competitive service employee and a probationary veteran's preference excepted service employee is entitled only to written notice stating the reasons for the

action and the effective date of the separation. See 5 C.F.R. § 315.804. The employee need not even receive the termination notice before its effective date if the agency acts with reasonable diligence to provide it in advance. Santillan v. Dep't. of Air Force, 54 M.S.P.R. 21 (1992). If, however, the action is based, in whole or in part, on incidents arising before appointment, the agency must provide the employee advance written notice, an opportunity to respond in writing, and a final written decision. See 5 C.F.R. § 315.805. and Pierce v. GPO, 70 F.3d 106, (1996) (In reviewing the appeal rights of a probationary employee, a claim that the removal was based on either a learning disability or sexual harassment by a supervisor does not constitute a pre-appointment reason entitling the employee limited due process under 5 CFR § 315.805.) Presumably, the employee **could file an EEO complaint.**; Munson v. Dep't of Justice, 55 M.S.P.R. 246 (1992); James v. Dep't of Army, 55 M.S.P.R. 124 (1992).

(2) Appeal right to MSPB. By OPM regulation, probationary employees can appeal a firing to the MSPB if the firing is based on a nonfrivolous allegation of partisan political reasons or marital status. The MSPB and courts have strictly scrutinized appeals invoking this jurisdiction before granting review.

Partisan political reasons are those relating solely to recognized political parties, candidates for office, and political campaign activities. Poorsina v. MSPB, 726 F.2d 507 (9th Cir. 1984). It does not include an employee's affiliation with a labor organization. Schindler v. General Services Admin., 53 M.S.P.R. 171 (1992); Masticano v. FAA, 714 F.2d 1152 (Fed. Cir. 1983). Bante v. Merit Systems Protection Bd., 966 F.2d 647 (Fed. Cir. 1992) (discussing the requirement for partisan politics review generally).

Marital status is not the same as sexual discrimination; it includes only discrimination based on marriage. A successful allegation by a single woman would be that management terminated her because it perceived married women as more mature and stable. The converse allegation by a married woman would be termination because management sought a single woman who was less likely to have children and leave the position. Edem v. Dep't of Commerce, 64 M.S.P.R. 501 (1994); Bedynek-Stumm v. Dep't of Agriculture, 57 M.S.P.R. 176 (1993); Gribben v. Dep't of Justice, 55 M.S.P.R. 257 (1992); Hurst v. GSA, 2 M.S.P.R. 497 (1980). Employees have been unsuccessful in attempts to obtain an expansive interpretation of "marital status" discrimination. See, e.g., Yakupzack v. Department of Agriculture, 10 M.S.P.R. 180 (1982) and Shah v. GSA, 7 M.S.P.R. 626 (1981).

Probationary employees fired for preemployment matters can appeal a removal to the MSPB for defects in the procedures required by 5 C.F.R. § 315.805. In this appeal, however, the MSPB will not review the substantive merits of the action, but rather only the procedures. Hibbard v. Department of Interior, 6 M.S.P.R. 181 (1981).

A probationary employee who appeals to the MSPB based on a nonfrivolous allegation of partisan political or marital status discrimination or on improper procedures for preemployment matters can also properly raise additional allegations of discrimination based on sex, race, religion, color, national origin, age, or handicapping condition. See 5 C.F.R. § 315.806. Allegations of discrimination because of race, religion, color, sex, national origin, age, or

handicapping condition do not, standing alone, invoke the jurisdiction of the MSPB; a remedy under those circumstances is only through equal employment opportunity channels discussed in Chapter 10 of this book. The MSPB will, however, hear evidence of discrimination in any case properly before it. Roja v. Dep't of Navy, 55 M.S.P.R. 618 (1992).

(3) Special Counsel action. Any federal employee, even probationers, can complain to the Office of Special Counsel that a personnel action allegedly constitutes a prohibited personnel practice as defined in 5 U.S.C. § 2302(b). The Special Counsel can seek corrective action, if a personnel action appears to have been taken for improper reasons, and administratively prosecute the agency official responsible for the prohibited personnel practice. The Special Counsel brings these cases before the MSPB. The MSPB can also grant the Special Counsel a stay of pending personnel action while it investigates an allegation based on only the Special Counsel's petition. See generally 5 C.F.R. Part 1209. Such a stay need be supported only by "reasonable grounds." Special Counsel v. Dep't of Air force, 55 M.S.P.R. 482 (1992). A probationary employee's service during a stay period will not, however, count toward satisfaction of the probationary period if the stay extends beyond the one-year probationary period; the stay merely preserves the status quo. See Special Counsel v. Department of Veterans Affairs, 45 M.S.P.R. 486 (1990); Special Counsel v. Department of Commerce, 23 M.S.P.R. 469 (1984).

A good faith allegation of a prohibited personnel practice generally does not give the probationary employee an independent appeal right to the MSPB. That employee may complain to the Special Counsel, and the Special Counsel has discretion in pursuing the matter. Borrell v. U.S. International Communications Agency, 682 F.2d 981 (D.C. Cir. 1982) and Gwen v. MSPB, 681 F.2d 867 (D.C. Cir. 1982). An employee who complains to the Special Counsel that a personnel practice violates the provisions of the Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8), however, may bring an independent action before the MSPB if the Special Counsel either defers action or fails to act within 120 days (referred to as the independent right of action, or "IRA"). 5 U.S.C. § 1221; 5 C.F.R. § 120.3(b). *See also* Horton v. Dep't of Transp., 66 F.3d 279 (Fed. Cir. 1995 (affirming removal and nonselection for promotion appeal by probationary employee who alleged whistleblower reprisal).

(4) DOD Agency Grievance Procedure. The final possible avenue for a probationary employee to challenge a removal is to grieve under the agency's grievance procedure. The DOD procedure is discussed in chapter 3, above. Under prior OPM regulations (5 C.F.R. Part 771), probationary employees were not entitled to grieve removal. Agencies are now free to implement their own grievance systems without the requirements of 5 C.F.R. Part 771. Most will continue to prohibit removal grievances by probationers, as does the DOD Greivance Process. See DOD AGS Memorandum, para 13-1d(2)(c).

b. Excepted service employee rights. Among excepted service employees, only preference eligible employees with one year of service or, after August 17, 1990, most other Schedule A and B excepted service with over two years' continuous service, receive appeal rights to the MSPB from a true adverse action. These employees are considered "nonprobationary." Those excepted service employees who do not fall within one of these groups receive even fewer due process protections than competitive service probationary employees.

(1) Predecisional rights. An excepted service employee who is not a preference eligible and not covered by the Civil Service Due Process Amendments of 1990 receives no predecisional rights in any disciplinary action. An excepted service employee who is a preference eligible beyond the first year of employment or has two or more years of current, continuous service (nonprobationary equivalent) receives the same predecisional rights as a nonprobationary competitive service employee for true adverse actions. See 5 U.S.C. § 7511. These excepted service employees still receive no predecisional rights, however, for suspensions of 14 days or less. See 5 U.S.C. §§ 7501-7503.

(2) Appeal rights to MSPB. Only nonprobationary excepted service employees have appeal rights to the MSPB. Probationary excepted service employees can, however, appeal a personnel action to the based on a nonfrivolous allegation of partisan political reasons or marital status, just as probationary competitive service employees. Kane v. Dept of Army, 60 M.S.P.R. 605 (1994).

(3) Special Counsel action. Excepted service employees have the same rights as competitive service and all other employees to complain to the Special Counsel and allege that a personnel action is based on a prohibited personnel practice.

(4) DOD grievance procedure. Excepted service employees who have completed a one-year period of employment, equivalent to the one-year probationary period, may grieve their disciplinary actions, including removals, under the DOD AGS.

4.6 Constitutional right to due process. The rights of probationary competitive excepted service employees just discussed are based on statute and regulation. They are the only rights these employees receive in a disciplinary action, unless they can demonstrate a constitutional right to a hearing based upon the implication of a property right or a liberty interest.

a. Property right. An reasonable expectation of continued employment can create a property right protected by the due process clause of the fifth amendment to the U.S. Constitution. Arnett v. Kennedy, 416 U.S. 134 (1974). When a property right is implicated, the person to be adversely affected is entitled to "some kind of prior hearing." Board of Regents v. Roth, 408 U.S. 564, 570 (1972). Because federal employees' rights are so specifically delineated in law and regulation, however, a constitutional property right will be implicated only when the Civil Service Reform Act provides due process protections. Bush v. Lucas, 462 U.S. 367, 378 n. 14 (1983) (holding civil service protections are "clearly constitutionally adequate").

(1) Statutory right. A property right has been created by statute for nonprobationary competitive service employees and nonprobationary equivalent excepted service employees. This property right is created by language in 5 U.S.C. § 501, which states that these employees may only be removed "for such cause as will promote the efficiency of the service." The Court in Arnett v. Kennedy found that the language in Section 7501 created an expectation in continued Federal employment absent cause. The Court in Arnett v. Kennedy also determined

that the procedural protections provided to these employees, similar to what is currently provided, satisfied due process requirements. The Court reaffirmed that aspect of Arnett v. Kennedy in Cleveland School Board v. Loudermill, 470 U.S. 532 (1985). No such reasonable expectation of continued employment can arise for a probationary or probationary equivalent employee, since the statutes that enable their employment provide no such right to a hearing.

(2) Other property right. The U.S. Supreme Court in Board of Board of Regents v. Roth, 408 U.S. 564 (1972), held that a property right could be created by something other than a statutory provision. The Court suggested that rules or understandings between an agency and its employees could create an expectancy in continued employment and create a property right in employment. See Ashton v. Civiletti, 613 F.2d 923 (D.C. Cir. 1979), and Paige v. Harris, 584 F.2d 178 (7th Cir. 1978), where the courts found property rights created by language in agency handbooks suggesting that employment would not be terminated except for cause. But see Fiorentino v. United States, 607 F.2d 963 (Ct. Cl. 1979) where the court found no property right created by the same handbook provision examined in Paige v. Harris. The courts in Ashton and Paige found that the employees were entitled to a hearing for their termination even though statute and implementing OPM and agency regulations provided them no such right. While the implication of a property right may trigger a right to a hearing, that hearing does not necessarily have to be a formal trial-type hearing, and, absent a statutory change, that hearing is not before the MSPB.

Note. For a discussion of Cleveland School Board v. Loudermill, and the possible expansion of due process property rights for Federal employees, see St. Amand, Probationary and Excepted Service Employee Rights in Disciplinary Acts in the Wake of Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1, and Garrow v. Gramm, 856 F.2d 203 (D.C. Cir 1988).

b. Liberty interest. A second Constitutional basis to assert some right to procedural due process protection is to establish that a "liberty interest" is at stake.

(1) Nature of the interest. A liberty interest is a right not to have stigmatizing information about you disseminated without an opportunity to respond. Board of Regents v. Roth, 408 U.S. at 572-575. Stigmatizing information in an employment context refers to a person's general character, reputation, or misconduct that could adversely affect the individual's ability to take advantage of other employment opportunities.

To be actionable in an employment context, the stigmatizing information must be associated with the loss of a job and it must be disseminated. Siegert v. Gilley, 111 S. Ct. 1789 (1991); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693, 706-709 (1976); Lyons v. Barrett, 851 F.2d 406 (D.C. Cir. 1988).

The 10th Circuit Court of Appeals has found a liberty interest implicated when the Air Force fired a probationary employee for falsifying a preappointment document. The court found that referring to a person being a liar, if disseminated, could adversely affect the individual's ability to take advantage of other employment opportunities. The court also found the

dissemination element satisfied by the Air Force's disclosing the reasons for the termination to the Oklahoma Employment Security Commission for use in determining the individual's entitlement to unemployment benefits. Walker v. United States, 744 F.2d 67 (10th Cir. 1984). In response to Walker, OPM amended the Federal Personnel Manual to provide that agencies will not state the basis for an adverse action in agency documents unless the employee receives procedural protections that would satisfy due process requirements. See former FPM Supp. 296-33, " S31-4c and 4d. Although this FPM provision no longer exists, its Constitutional foundation does.

(2) Nature of the remedy. Courts have consistently held that an employee is only entitled to a hearing to clear the employee's name, not to litigate the question of reinstatement, if only a liberty interest is at stake, not a property right. Codd v. Velger, 429 U.S. 624 (1977). The right to a hearing exists only if the individual asserts that the information is false. There is no right to a hearing to argue inadequacy of evidence or credibility issues.

SECTION II: SUBSTANTIVE REQUIREMENTS FOR DISCIPLINARY ACTIONS

4.7 Introduction. The preceding section focused exclusively on the procedural aspects of disciplinary actions. This section will focus on the substantive aspects of discipline by examining the proof requirements to sustain a disciplinary action, whether challenged in an appeal to the MSPB or in a grievance and subsequent arbitration hearing.

In every disciplinary action the agency must prove by a preponderance of the evidence that:

a. The employee committed the act of misconduct forming the basis for the discipline;

b. The discipline is for "such cause as will promote the efficiency of the service" (5 U.S.C. §§ 7503(a) and 7513(a));

c. The penalty selected was appropriate for the misconduct and circumstances involved; and

d. The agency followed proper procedures.

4.8 Proving the Employee's Act of Misconduct.

a. General. Proving an act of misconduct in a hearing before an MSPB administrative judge or an arbitrator is no different than proving a case in any other administrative forum. Formal rules of evidence do not strictly apply at MSPB hearings. Accord Hillen v. Dep't of army, 66 M.S.P.R. 68, 84 (1994); Schrider v. U.S. Postal Service, 36 M.S.P.R. 650 (1988); Debose v. Department of Agriculture, 700 F.2d 1262 (9th Cir. 1983). Administrative judges can admit any category of evidence. Arterberry v. Department of Air Force, 25 M.S.P.R. 582 (1985).

Any evidence that is relevant, material, and not unduly repetitious will be admitted. Hearsay evidence is admissible and, even standing alone, may be sufficient proof; the nature of the evidence goes to its weight and not to admissibility. Marable v. Dep't of Army, 52 M.S.P.R. 622 (1992); Campbell v. Department of Transportation, FAA, 735 F.2d 497 (Fed. Cir. 1984). Hearsay evidence alone will usually be insufficient proof if contradicted by sworn nonhearsay testimony. Dubiel v. U.S. Postal Service, 54 M.S.P.R. 428 (1992); Bonner v. Department of Navy, 18 M.S.P.R. 659 (1984). For a detailed discussion of the use of hearsay in MSPB proceedings, see Borninkhof v. Department of Justice, 11 M.S.P.R. 177 (1982) and 5 M.S.P.R. 77 (1981); and Behensky v. Department of Transportation, 19 M.S.P.R. 341 (1984).

b. Evidence of conviction. As an alternative to presenting independent evidence of misconduct, agency counsel can satisfy the agency's burden by use of a state or Federal criminal court conviction. The agency may meet its obligation to prove the misconduct by introducing a judgment of conviction on the same charges stated in the judgment of conviction. The employee does not have a right to relitigate before the MSPB what has already been decided in the criminal trial.

The MSPB recently approved such administrative collateral estoppel, or issue preclusion, in Beasley v. Dep't of Defense, 52 M.S.P.R. 572 (1992). The rule had been firmly established in Otherson v. Department of Justice, 711 F.2d 267 (D.C. Cir. 1983) and Chisholm v. Defense Logistics Agency, 656 F.2d 42 (3d Cir. 1981), and was tacitly approved in Crofoot v. Government Printing Office, 761 F.2d 661 (Fed. Cir. 1985). The court's opinion in Otherson, set out in part below, contains an excellent discussion of how the process operates.

Otherson v. Department of Justice,
711 F.2d 267 (D.C. Cir. 1983).

McGOWAN, Senior Circuit Judge:

> Jeffrey Otherson formerly worked as a border patrol agent for the Immigration and Naturalization Service (INS). INS discharged him after he and a co-worker received criminal convictions for physically abusing liens according to a prearranged scheme they carried out during working hours with apparent zest. When Otherson appealed his discharge, the Merit Systems Protection Board (MSPB) held that the doctrine of issue preclusion, also known as collateral estoppel, forbade him from relitigating the facts established at the criminal trial. It also found discharge appropriate given the nature of Otherson's misconduct.
>
> On review of this order, we are asked to resolve three questions: (1) whether issues determined at prior criminal trials may ever be preclusively established at later MSPB adverse action hearings; (2) whether the MSPB properly found preclusion appropriate in the particular circumstances of this case; and (3) whether discharge was an appropriate sanction for Otherson's misconduct. . . .

I.

On January 29, 1980, the Government filed a two-count superseding information charging Otherson and another agent with misdemeanor Federal offenses. It alleged that they had deprived aliens of Federal rights in violation of 18 U.S.C. § 242 (1976), and had conspired to effect his deprivation in violation of 18 U.S.C. § 371 (1976). The offending conduct involved several instances of on-duty physical assault against aliens according to a prearranged scheme. . . .

On March 17, 1980, the trial judge found both defendants guilty on both counts. He fined Otherson $1,000 for one count, and suspended sentence on the other, placing Otherson on three years' probation and ordering him to perform 750 hours of community service. . . .

On June 2, 1980, INS removed Otherson from his job effective June 13, 1980, having notified him of its proposal to do so on February 28. INS cited Otherson's mistreatment of aliens as the reasons for removal and specified the same acts of misconduct contained in the superseding information on which Otherson had been convicted. Otherson appealed his removal to the MSPB. At a hearing before a presiding official, the INS bore the burden of proving beyond a preponderance of the evidence, 5 U.S.C. § 7701(C)(1)(B) (Supp. V 1981), that Otherson's removal would "promote the efficiency of the [Federal] service." id. § 7513(a). INS relied on Otherson's-criminal conviction to prove that he had in fact committed the specified misconduct. In addition, it offered the testimony of the INS official who removed Otherson. The official testified that he reviewed the record of the criminal proceedings and that the seriousness of Otherson's criminal acts made removal appropriate.

The presiding official affirmed Otherson's removal. First, she rejected Otherson's contention that prior judicial determinations could never preclusively establish issues in MSPB hearings, citing the Board's decision in Chisholm v. Defense Logistics Agency, 3 MSPB 273 (1980), aff'd, 656 F.2d 42 (3d Cir. 1981). Second, after reviewing the entire record of the criminal trials, she found that the factual issues of misconduct in the adverse action hearing were identical to those in the criminal proceeding, and that they had been actually litigated and necessarily determined at the criminal trial. Accordingly, she found preclusion appropriate for those issues and refused to consider Otherson's attempts to deny he had in fact mistreated aliens. . . . Otherson then sought review of the presiding official's decision by the full MSPB. The Board denied the petition, stating that the MSPB "is entitled to rely on the doctrine of collateral estoppel, and finds that the doctrine was properly applied by the presiding official in [this] case[ ]."

Finally, Otherson sought review of the MSPB's final decision in this court. He presses before us the . . . contentions he raised before the presiding official. First, he argues that an employee's statutory right to a hearing in appeals to the MSPB makes

issue preclusion inappropriate. Second, he argues that the doctrine of issue preclusion, even if applicable in MSPB hearings, does not bar relitigation given the particular circumstances of the criminal conviction. . . .

II.

Courts have often held that issues determined in connection with a criminal conviction may be taken as preclusively established for the purposes of later civil trials. See Emich Motors Corp. v. General Motors Corp., 840 U.S. 558 (1951); McCord v. Bailey, 636 F.2d 606 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). Courts have less frequently addressed, however, the effect of criminal convictions or other judicial determinations in later administrative proceedings. Otherson claims that the judicial doctrine of issue preclusion has no place in MSPB hearings. Squarely against his contention, however, is a recent holding of the Third Circuit in Chisholm v. Defense Logistics Agency, 565 F.2d 42 (3d Cir. 1981). We find the Chisholm court's reasoning persuasive and thus hold that issues determined in a criminal conviction may be accorded preclusive effect at a later MSPB adverse action hearing if the normal standards for preclusion are satisfied.

Congress established the MSPB as "a quasi-judicial body." S.Rep. No. 969, 95th Cong., 2d Sess. 24 (1978). U.S. Code Cong. & Admin. News 1978, 2723. As the Third Circuit held,

> the same policy reasons which underlie use of collateral estoppel in judicial proceedings are equally applicable when the administrative board acts as an adjudicatory body. It is well established that the doctrine of collateral estoppel contributes to efficient judicial administration, serving the public interest in judicial economy as well as the parties' interests in finality, certainty of affairs and avoidance of unnecessary relitigation.

Chisholm, 656 F.2d at 46. It should be remembered also that issue preclusion is appropriate in only certain circumstances and is subject to important exceptions to prevent unfairness. Indeed, even as the Third Circuit held the principles of preclusion appropriate in MSPB hearings, it remanded the Chisholm case for the MSPB to inquire more carefully into the prior criminal conviction to determine the precise issues "in fact litigated and necessarily decided adversely" to the defendant. Given the care with which courts have elaborated the doctrine of preclusion, we see no reason why the MSPB may not apply the doctrine in its own hearings as circumstances permit.

The heart of Otherson's contention that issue preclusion is always inappropriate is that an employee has a right to a hearing in adverse action appeals to the MSPB, 5 U.S.C. § 7701(a)(1) (Supp. V 1981). . . .

The fact that Congress guaranteed employees one full opportunity to be heard, however, does not mean that Congress intended them to have more than one. Issue preclusion is only appropriate when a party had a full and fair opportunity to present his case at a prior hearing, . . . and the employee may always argue in his hearing before the MSPB that the prior proceeding failed to meet this standard. Just as application of issue preclusion in civil trials does not unlawfully deprive litigants of their day in court, neither does application of issue preclusion in MSPB hearings deprive employees of their statutory hearing rights. Moreover, only those issues determined against the employee at the earlier proceeding may not be contested again. Employees whose misconduct is established preclusively will thus still have an undiminished opportunity to press other arguments before the Board, such as whether removal would promote the efficiency of the service.

III.

Otherson's next attack is on the appropriateness of giving preclusive effect to facts underlying this particular criminal conviction. Because his attack is on several fronts--some at which he fights more fiercely than others--it will be wise to set out in brief form the elements of issue preclusion, also known as collateral estoppel. Along with the doctrine of claim preclusion or res judicata, issue preclusion aims to avert needless relitigation and disturbance of repose, without inadvertently inducing extra litigation or unfairly sacrificing a person's day in court. As the Supreme Court has explained,

> "a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

Issue preclusion establishes in a later trial on a different claim identical issues resolved in an earlier trial, if certain conditions are met. First, the issue must have been actually litigated, that is, contested by the parties and submitted for determination by the court. See Cromwell v. County of Sac, 94 U.S. 351, 353 (1877) ("only as to those matters in issue or points controverted"); Stebbins v. Keystone Insurance Co., 481 F.2d 501, 508 (D.C. Cir. 1973). Second, the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial. Montana v. United States, 440 U.S. 147, 153 (1979) (citing draft version of what became RESTATEMENT (SECOND) OF JUDGMENTS § 27). See also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979) ("necessary to the outcome of the first action"); accord Association of Bituminous Contractors Inc. v. Andrus, 581 F.2d 853, 859-60 (D.C. Cir. 1978). Third, preclusion in the second trial must not work an unfairness. Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes

of the second trial. See Blonder-Tongue Laboratories, 402 U.S. at 333 (in connection with preclusion against plaintiff in second action who lost as plaintiff in first action against a different defendant); see also Parklane Hosiery, 439 U.S. at 330 (heightened concern for potential unfairness from preclusion against defendant in second action brought by plaintiff not a party to the first suit). We now consider each factor with respect to preclusion at Otherson's MSPB hearing.

A. Necessarily Determined in the First Action

We can dispose of one element without much difficulty: whether the criminal trial necessarily determined the facts the Government sought to establish preclusively at the MSPB hearing. Otherson notes that each count against him and his co-defendant included either conspiracy, 18 U.S.C. § 371 (1976), or aiding and abetting, id § 2, as a source of liability. He also notes that the judge rendered no special findings of fact. Perhaps, he argues, the judge's general verdict did not decide in the Government's favor on every fact the Government alleged and to which the Government's witnesses testified. Perhaps the court found Otherson's own involvement to be less direct and substantial than alleged, illegal only on grounds of conspiracy or aiding and abetting.

We find this argument unconvincing. Otherson has not shown that "'a rational [factfinder] could have grounded its verdict upon an issue other than that which the [party] seeks to foreclose from consideration.'" Ashe v. Swenson 397 U.S. 436, 444 (1970) (effect of prior acquittal). As Emich Motors Corp. v. General Motors Corp, 340 U.S. 558, 569 (1951), required, the MSPB presiding official examined the record of the prior trial in detail to see if the judge might have disbelieved some aspects of the acts charged. The MSPB examination was not to be "hypertechnical," but to be conducted "with realism and rationality." Ashe, 397 U.S. at 444. The only grounds the judge at the criminal trial had for doubting the Government's version of events was Otherson's cross-examination, which made general attacks on the witnesses' credibility. The MSPB official concluded that the judge must have found the Government's witnesses credible, and thus that "it was necessary and essential for the court to find that the defendants did commit the acts listed in the pleadings." We find this conclusion to be perfectly reasonable and thus reject Otherson's contention that the general verdict at the criminal trial did not necessarily determine against him the facts preclusively established at the MSPB hearing.

B. Actually Litigated

Otherson next contends that, because the criminal trial was conducted on the basis of a stipulated record, the issues were not actually litigated. His contention, however, misconstrues the sort of stipulations that bring issues outside the actual litigation requirement. Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been "actually litigated" and thus is not a proper candidate for issue preclusion. See Sekaquaptewa v. MacDonald, 575 F.2d 239, 247 (9th Cir. 1978); Anderson, Clayton & Co. v.

United States, 562 F.2d 972, 992 (5th Cir. 1977), cert. denied, 436 U.S. 944 (1978); Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979) (alternative holding); cf. United States v. International Building Co., 345 U.S. 502 (1953) (consent judgment); Tutt v. Doby, 459 F.2d 119, 1199-200 (D.C. Cir. 1972) (default judgment). The reasoning behind this rule is apparent from the Restatement's articulation of the actual litigation requirement:

> The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party, are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action could be narrowed by stipulation and thus to intensify litigation.

Otherson, however, did not stipulate to the truth of the Government's allegations. He simply stipulated that the Government's witnesses would testify in the second trial as they had at the first. When a stipulation merely helps to shape the record a factfinder will use to determine the truth of a fact, rather than to establish the truth of the fact itself, that fact may be preclusively established in a later trial if the other requirements for issue preclusion are met. See Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir.), cert. denied, 350 U.S. 838 (1955). Otherson contested the allegations against him through his attorney's cross-examination, and the parties left it to the trial judge to evaluate the witnesses' testimony and determine whether the Government established its allegations beyond a reasonable doubt. Therefore, the factual basis of the charges was actually litigated and those facts are appropriate for issue preclusion at later proceedings.

C. Incentive to Litigate

Fears that a party might have litigated less than fully because the stakes in the first action were low in relation to those in the second inhere in the justification for not preclusively establishing issues not actually litigated. See Tutt v. Doby, 459 F.2d 1195, 1200 (D.C. Cir. 1972) (incentive-to-litigate problems in default judgments); Red Lake Band v. United States, 607 F.2d 930, 934-35 (Ct. Cl. 1979) (lack of incentive to litigate a factor in affording no preclusive effect to issues resolved by stipulation); . . . Courts, however, have considered potential unfairness from a lack of incentive to litigate even when some litigation actually took place in the first trial. See Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532, 540 (2d Cir. 1965) (among other considerations), cert. denied, 382 U.S. 983 (1966); Spiker v. Hankin, 188 F.2d 35, 39 (D.C. Cir. 1951) (same). In the Restatement's formulation, lack of incentive to litigate is one consideration for possible exception from preclusion even in cases where the other requirements for preclusion are met. See Restatement (Second) Of Judgments § 28(5)(c).

We now consider and reject two arguments that Otherson's lack of incentive to litigate fully in the first trial makes preclusion inappropriate even though the facts were contested and submitted for judicial determination. The first argument is that the stakes in the first trial were quite low in relation to the stakes at the MSPB hearing. Otherson was fined $1,000 and was at risk for only six months in jail, see App. 15. This is arguably much less than the stakes of a proceeding concerning a discharge from employment. Indeed, one circuit that has found preclusion generally appropriate for issues determined by verdicts entered upon guilty pleas has suggested that facts inhering in a guilty plea to a misdemeanor may not similarly be established preclusively in later trials. In re Raiford, 695 F.2d 521, 524 (11th Cir. 1983). Yet Otherson's case is one good example of a defendant who took the first trial quite seriously even though he was at risk for only a small amount. See Zdanok v. Glidden Co. 327 F.2d 944, 956 (2d Cir.) (defended first action with vigor, so preclusion appropriate in second action for much higher stakes); cert. denied, 377 U.S. 934 (1964). Although he did withhold some of his evidence, he obviously thought the charge a serious one, for he pursued his appeal on the legality of his conviction all the way to the Supreme Court. Therefore, preclusion is much more appropriate here than in a case where a defendant put up no resistance at all because the misdemeanor was too trivial to worry about.

A second argument for an exception to preclusion is that the bargain with the prosecution created an actual disincentive to litigate these particular issues, above and beyond the fact that Otherson was at risk for only a misdemeanor. Had Otherson insisted on presenting his full factual defenses to the allegations, he presumably would have faced felony charges rather than misdemeanors. In this respect Otherson's plight resembles that of the party sought to be bound in Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983 (1966).

Although this contention merits serious consideration, we nonetheless find preclusion appropriate under the circumstances. We note first that preclusion is sought here by Otherson's adversary in the first trial, the Federal Government. According to the Restatement's formulation, when preclusion is sought by a former adversary, and the other requirements for preclusion are met, courts should refuse to give the first judgment preclusive effect on grounds that the party lacked adequate incentive to litigate in the first proceeding only upon a "compelling showing of unfairness." Restatement (Second) Of Judgments § 28 comment j. Even the fact that the first determination was "patently erroneous" is not alone sufficient. . . . The apparent justification for this formulation is that relitigation between the same two adversaries is more strikingly wasteful than relitigation between two different parties and that parties can most readily foresee, and expect to be subject to issue preclusion in future suits involving a present adversary.

Under the circumstances we think there is no great unfairness in holding Otherson to the determinations from his prior criminal conviction. Even without the

full evidentiary presentation Otherson made at the felony trial, the misdemeanor conviction does provide an extra margin of reliability that dispels some of the worries about using the conviction at the MSPB hearing. The court found Otherson guilty beyond a reasonable doubt. It did so after considering the testimony of witnesses subjected to full cross examination. Given that the Government must prove misconduct at the MSPB hearing by a mere preponderance of the evidence, it is not likely that preclusive use of the conviction will work an unfairness at the later hearing.

. . . .

For the foregoing reasons, we deny Otherson's petition for review.

Note 1. One of the requirements for use of collateral estoppel as outlined in Otherson is actual litigation of the issue in dispute. This requirement raises a serious question about the propriety of using collateral estoppel based on a nolo contendere plea or what has become known as an Alford plea of guilty. An Alford plea of guilty is a guilty plea where the individual does not admit the underlying facts and the court does not make a finding on the underlying facts. North Carolina v. Alford, 400 U.S. 25 (1970). To view how the MSPB and the Court of Appeals for the Federal Circuit have analyzed the difficult questions presented by an Alford or nolo contendere plea, see Wenzel v. Dep't of Interior, 33 M.S.P.R. 344, aff'd 837 F.2d 1097 (Fed. Cir. 1987)(approving use of estoppel in nolo plea); Crofoot v. GPO, 823 F.2d 495 (Fed. Cir. 1987); Graybill v. USPS, 782 F.2d 1597 (Fed. Cir. 1986); Loveland v. Air Force, 34 M.S.P.R. 484 (1987); and Crofoot v. GPO, 31 M.S.P.R. 442 (1986).

Note 2. Even if collateral estoppel cannot be used based on an Alford plea, the Court of Appeals for the Federal Circuit in Crofoot sanctioned disciplinary action for "notoriously disgraceful conduct" based on a conviction resulting from an Alford plea. Of course the agency had to demonstrate how the conviction in that case amounted to notoriously disgraceful conduct. It did so by showing that Crofoot's conviction was known throughout the agency and was considered particularly disgraceful because the nature of the offense was closely related to the work Crofoot performed for the agency.

Note 3. The Board may, even if collateral estoppel is inappropriate, rely upon a documentary record from the criminal proceedings to establish the fact of misconduct. Payer v. Department of Army, 19 M.S.P.R. 534 (1984).

Note 4. If collateral estoppel is available, it clearly satisfies the agency's burden of proof; however, if the agency has independent evidence to prove the misconduct, it is wise to also introduce that evidence to preclude the case later being lost if the criminal case is reversed on appeal or the charges of the removal are not identical to those of the conviction. Owens v. U.S. Postal Service, 57 M.S.P.R. 63 (1993); Robinson v. Department of Army, 21 M.S.P.R. 270 (1984).

c. Evidence of indictment. An agency will occasionally want to discipline an employee pending criminal charges, but it lacks the independent evidence to pursue the charges. An indictment is clearly insufficient evidence or proof of the underlying misconduct. Brown v. Department of Justice, 715 F.2d 662, 667 (D.C. Cir. 1983); O'Connor v. Dep't of Veterans Affairs, 59 M.S.P.R. 653 (1993); Roby v. Dep't of Justice, 59 M.S.P.R. 426 (1993); Crespo v. U.S. Postal Service, 53 M.S.P.R. (1992). The agency still has options, however.

A federal agency may take disciplinary action when it has reasonable cause to believe that an employee has committed a crime for which imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Evidence of indictment provides this reasonable cause. Accord Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed. Cir. 1993); Dunnington v. Dep't of Justice, 956 F.2d 1151 (Fed. Cir. 1992); Smith v. Gov't Printing Office, 60 M.S.P.R. 450 (1994); Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976). Evidence that the employee was arrested or is under investigation is insufficient. Richardson v. U.S. Custom Serv., 47 F.3d 415 (Fed. Cir. 1995); Reid v. U.S. Postal Service, 54 M.S.P.R. 648 (1992); Larson v. Department of Navy, 22 M.S.P.R. 260 (1984); Martin v. Department of Treasury, 16 M.S.P.R. 292 (1982). But see Dunnington v. Department of Justice and OPM, 45 M.S.P.R. 305 (1990), aff'd, 956 F.2d 1151 (Fed. Cir. 1992) (arrest based on arrest warrant issued by neutral magistrate based on a finding of probable cause sufficient).

Typically the discipline imposed in this situation is an indefinite suspension pending resolution of the criminal charges. This type of disciplinary action will be examined in detail in paragraph 4.13 of this chapter.

4.9 Proving the Connection Between the Misconduct and the Efficiency of the Service -- "Nexus." Proving that the employee did something wrong, even criminal, is insufficient to justify disciplinary action. Serious disciplinary actions may be taken only "for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). This requirement to prove the impact on the efficiency of the service has become known as the "nexus" requirement.

a. The nexus requirement: the general rule. The nexus requirement is not something new created by the Civil Service Reform Act of 1978. It has existed since the passage of the Lloyd-LaFollette Act in 1912 and has been the subject of much judicial interpretation by the various U.S. courts of appeals. The MSPB first examined in detail this nexus requirement under the CSRA in Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981). The Board in Merritt examined judicial precedent to date and established the foundation for all subsequent Board decisions in this area. This lead case is set forth in part below.

Merritt v. Department of Justice
6 M.S.P.R. 585 (1981)

[Footnotes and selected portions deleted].

OPINION AND ORDER

This appeal raises the issue of when off-duty misconduct may justify the removal of a non-probationary competitive service employee, an issue not previously addressed by this Board. The issue involves the historically perplexing question of how such misconduct must relate to "the efficiency of the service" before action may be warranted under Chapter 75 of Title 5, U.S. Code. It also involves the impact on that standard of a statutory provision newly enacted by the Civil Service Reform Act of 1978 (the Reform Act), which now makes it a prohibited personnel practice to take a personnel action discriminating "on the basis of conduct which does not adversely affect the performance of the employee . . . or the performance of others." 5 U.S.C. § 2302(b)(10).

I. FACTUAL BACKGROUND

The appellant had been employed with the agency for eighteen months when his removal was effected based on . . . possessing and using marijuana . . . the presiding official sustained the . . . charge based on appellant's own admission.

Appellant contended that his removal on the . . . sustained charge did not promote the efficiency of the service, especially in light of his acceptable and improving performance record. The agency asserted that his disregard of the law in possessing marijuana destroyed the trust that the agency must have in his vigorous enforcement of the contraband regulations of the institution, particularly those prohibiting the possession and use of marijuana in the facility. Additionally, the agency argued that appellant could be subject to "pressures and blackmail" by inmates who might learn of his offense.

II. EFFICIENCY OF THE SERVICE STANDARD

The removal of a Federal employee for misconduct is governed by 5 U.S.C. Chapter 75. Section 7513(a) of that Chapter, as amended by the Reform Act, provides that:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service. [Emphasis supplied]

Regulations to implement section 7513(a) have been issued by the Office of Personnel Management (OPM) in 5 C.F.R. Part 752, but those regulations do not attempt to define or elaborate upon the statutory "efficiency of the service" standard.

While no directly applicable regulatory interpretation of the standard is available, the statutory language echoes that of predecessor statutes dating back to the Lloyd-LaFollette Act in 1912. Prior to the enactment of the Reform Act, the "efficiency of the service" standard was codified in 5 U.S.C. 7501(a) and 7512(a).

The courts have thus had many years in which to interpret that standard in the context of charges relating to off-duty misconduct. Therefore, to determine what the standard requires, we commence by examining the pertinent judicial decisions in order to ascertain the state of the case law on this subject at the time Congress in 1978 reenacted the standard while simultaneously enacting 5 U.S.C. § 2302(b)(10).

A. Judicial Treatment of the Standard

Any casual review of the many Federal court decisions on this subject is bound to suggest a widespread lack of judicial consensus as to the requirements of the statutory standard, with results that sometimes appear clearly inconsistent under circumstances that seem distinguishable only by the most fanatical hair-splitter.

However, the clearly discernible trend over the past decade or so has been toward closer judicial examination of agency claims that an employee's off-duty behavior relates sufficiently to the efficiency of the service to justify firing the employee for the behavior. . . .

The trend toward closer judicial scrutiny of off-duty misconduct as allegedly related to service efficiency received its initial impetus from the 1969 decision of the D.C. Circuit in Norton v. Macy, 417 F.2d 1161. Observing that "[t]he Due Process Clause may . . . cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is . . . a foundation of several specific constitutional protections," id. at 1164, the court reversed the removal of a NASA budget analyst on alleged grounds of "immoral conduct" and of possessing personality traits which rendered him "unsuitable for Government employment." The court found that the employee's homosexual advance toward a stranger while off-duty had been proved as alleged by the agency, but concluded that the discharge was unlawful because the record established no "reasonable connection" between the evidence against him and the efficiency of the service. The Norton court reasoned that:

> . . . the notion that it could be an appropriate function of the Federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. And whatever we may think of the Government's qualifications to act in loco parentis in this way, the statute precludes it from discharging protected employees except for a reason related to the efficiency of the service.

Id. at 1165.

The only justification for removal mentioned by the agency in Norton was the possibility of embarrassment to the agency. The agency failed to establish and the court could not discern any "reasonably foreseeable, specific connection between [the] employee's potentially embarrassing conduct and the efficiency of the service."

Id. at 1167. Insisting that the employing agency "must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service,'" the court held that the sufficiency of the charges "must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do." Id. at 1164, 1166.

Following Morton, private sexual conduct involving only consenting adults was similarly found unrelated to service efficiency in Mindel v. U.S. Civil Service Commission, 312 F. Supp. 485, 488 (N.D. Cal. 1970), in which a district court reversed the removal of a postal clerk for cohabitating with a woman to whom he was not married, finding that there was no "rational nexus" between such conduct and the duties of a postal clerk. Also, in Major v. Hampton, 413 F. Supp. 66, 71 (E.D. La. 1976), a district court reversed the removal of an Internal Revenue Service return examiner for maintaining an apartment for discreet off-duty extramarital affairs, again finding a lack of nexus. The Major court noted:

> The examiner and the Appeals Review Board appear to have assumed that a person's moral character is homogeneous: those who behave improperly in one regard are likely to transgress in others. But this is both a logical nonsequitur and a psychological error. . . .
>
> A person may have impeccable sexual standards--or indeed be celibate--and yet steal. On the other hand, thieves may be faithful to their wives and attend religious services regularly.

413 F. Supp. at 71 n. 4.

In Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974), a differently constituted panel of the D.C. Circuit signaled a partial retreat from any implication in Norton that there must always be evidence directly substantiating the linkage of an employee's off-duty conduct to the efficiency of the service. Considering the removal of a postal foreman based upon his conviction for manslaughter, the court concluded that conviction of such a serious crime supplies the requisite nexus even without a showing of an explicit deleterious effect on the efficiency of the service. Finding that "it is clear that manslaughter, the unlawful taking of a human life, falls in the area where the nexus is strong and secure," the court nevertheless cautioned:

> We readily recognize that the nexus may become attenuated if an agency attempts to invoke the regulation for activities of a minor nature, such as a traffic citation. We leave the difficult task of drawing a line of demarcation for a future time.

510 F.2d at 1226.

The court also emphasized in Gueory that the presumption of nexus for such a serious crime is not "irrebuttable," and that "mere incantation by an agency of the interpretive regulation involving less serious criminal conduct might necessitate a different result." 510 F.2d at 1227.

The nexus requirement was given further elaboration by the D.C. Circuit in Doe v. Hampton, 566 F.2d 265 (1977), involving the dismissal of a clerk-typist on grounds of mental disability. The case did not concern off-duty misconduct, but the court's statement of the nexus requirement related generally to all adverse personnel actions:

> In law as well as logic, there must be a clear and direct relationship demonstrated between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate Government interest promoting the "efficiency of the service."

Id. at 272. The rationale for that requirement was explained as follows:

> The nexus requirement serves the salutary end of helping to ensure against abuse of personnel regulations by mandating that an adverse action be taken only for reasons that are directly related to a legitimate governmental interest, such as job performance. As a corollary, it also serves to minimize unjustified governmental intrusions into the private activities of Federal employees.
>
> The nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains. The question thus becomes whether the asserted grounds for the adverse action, if found supported by evidence, would directly relate either to the employee's ability to perform approved tasks or to the agency's ability to fulfill its assigned mission.

Id. at 272 n. 20

Shortly after Doe v. Hampton, the Seventh Circuit addressed the question of whether a nexus determination requires explicit evidence in its widely-quoted decision in Young v. Hampton, 568 F.2d 1253 (1977). As we read that opinion, virtually all of the more recent cases, and Morton and Gueory as well, can fit within the analytical frame laid down in Young. The court there reversed the removal of a product inspector by the Department of the Army based upon a conviction for off-duty possession of marijuana and other controlled substances (amphetamines, barbiturates, etc.) in his home. Federal regulations at 5 C.F.R. § 731.202(b)(2) permit suitability removals of an employee for "criminal, dishonest, infamous, or notoriously disgraceful conduct," the court noted, but, as under the statutory standard

for disciplinary adverse actions, a removal on such grounds is permitted only if such action will promote the efficiency of the service. In an opinion which thoroughly reviewed the existing case law, the Young court established these criteria for determining whether there is a rational basis for concluding that an employee's removal for off-duty misconduct will promote the efficiency of the service:

> The agency may base this determination . . . on [1] evidence adduced at the employee's hearing which tends to connect the employee's misconduct with the efficiency of the service; or [2] , in [a] certain egregious circumstances, where the adverse effect of retention on the efficiency of the service could, in light of the nature of the misconduct, reasonably be deemed substantial, and [b] where the employee can introduce no evidence showing an absence of effect on the efficiency of the service, the nature of the misconduct may "speak for itself".

Id. at 1257.

The agency in Young had failed to introduce a scintilla of evidence relating to the nexus question, while the employee presented testimony by his supervisor and foreman to the effect that the employee continued to do good work following his conviction. The court held, therefore, that the "vital nexus" had not been established. In so concluding, the Young court distinguished two earlier cases upholding removals based on drug charges, on the ground that evidence in those cases linked the charges with the employees' capacity to perform their jobs reliably.

It is important to observe that the test established by Young v. Hampton, while permitting the requisite nexus to be inferred in some cases without an explicit evidentiary demonstration by the agency, does so only when two conditions are both met. The first is that the particular misconduct must be egregious and of such a nature that the adverse effect of the employee's retention on the efficiency of the service can reasonably be deemed substantial. The second condition is that no evidence shows an absence of adverse effect on the efficiency of the service. This second condition is equivalent to Gueory's holding that the presumption of nexus arising from a serious criminal act is not an irrebuttable one. When either condition is not met, the nexus determination must be based on evidence connecting the employee's misconduct with the efficiency of the service.

The Court of Claims agreed with the Young analysis of the nexus problem in Masino v. United States, 589 F.2d 1048 (1978). Applying the Young criteria to the removal of a customs inspector for personal use and transportation of a small quantity of marijuana from New York to Arizona, the Court found, with "some reluctance, and agreeing that the issue is close," id. at 1049, that both of the conditions for determining nexus without explicit linking evidence were satisfied. Emphasizing that the employee had transported and used the very contraband which as a customs inspector he was sworn to interdict, the court concluded that his conduct

was so egregious that the adverse effect of retention on the efficiency of the service could reasonably be deemed "substantial." The employee having presented no evidence to show an absence of effect on the efficiency of the service, the removal action was sustained.

Two very recent decisions also seem consistent with the Young analysis. In Cooper v. United States, 639 F.2d 727 (Ct. Cl. 1980), the Court of Claims, while remanding for further factual findings in a discharged Navy employee's action for reinstatement, had no difficulty concluding that the employee's alleged sexual abuse of a five-year-old girl, if proven, would adversely affect the efficiency of the service. The particular conduct alleged was of a nature that would clearly be deemed abhorrent to any normal person, and the employee presented no evidence on his own behalf.

The D.C. Circuit, in Yacovone v. Bolger, No. 79-2043 (Slip op., Feb. 20, 1981), reversing 470 F. Supp. 777 (D.D.C. 1979), upheld the removal of a postmaster for a shoplifting conviction, based on evidence that the offense had become notorious in the local community with a significant effect on his reputation for honesty and integrity, and that he occupied a position of authority with fiduciary responsibilities including accountability for local postal revenues. Under these circumstances the court found that even though the appellant's conduct might be attributed to a mental illness of which he had since been cured, and in consequence of which he had since received a gubernatorial pardon, the nexus determination did not require evidence that the appellant's future conduct would interfere with the efficiency of the postal service.

. . . .

This was the current state of the law when Congress, while re-enacting the "efficiency of the service" standard in the Reform Act, also enacted 5 U.S.C. § 2302(b)(10).

B. The Effect of Section 2302(b)(10)

The Reform Act, at 5 U.S.C. § 2302(b)(10), makes it a prohibited personnel practice for any employee who has authority to take, direct others to take, recommend, or approve any personnel action, to:

> discriminate for or against an employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States. . . .

The question that necessarily then arises is whether Section 2302(b)(10) adds anything to the requirement of Sections 7503(a) and 7513(a) that Chapter 75 adverse actions be taken only "for such cause as will promote the efficiency of the service."

The Department of Justice and OPM assert that the only effect of Section 2302(b)(10) is to extend the protection of the nexus requirement to all the categories of employees and actions listed in 5 U.S.C. § 2302(a)(2), and to make available to persons covered by Chapter 75 as well as to others the protective authority of the Special Counsel in situations of alleged discrimination for nonservice-related conduct through personnel actions not subject to Chapter 75. Clearly, Section 2302(b)(10) does at least that much on its face.

. . . . We find that in enacting Section 2302(b)(10), Congress intended to make clear that in applying the efficiency of the service standard under Chapter 75 as well as in considering the alleged prohibited personnel practice, a nexus determination is essential and the law requires the Board and the courts to assure that such requirement is properly satisfied. Section 2302(b)(10) reflects Congressional approval of the trend in judicial interpretation of the efficiency of the service standard, already apparent in mid-1978 but then still much disputed among the Federal courts, toward closer scrutiny of nexus determinations made by agencies.

. . . .

We conclude that the requirement of Section 2302(b)(10) and the efficiency of the service standard are consistent with the Morton-Gueory-Young mode of analysis. Accordingly, we adopt the criteria for nexus determinations established by those cases, as more particularly described in our discussion of Young v. Hampton, ante at 19-20. The effect of the two conditions specified in Young is that a nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service or, in "certain egregious circumstances," on a presumption of nexus which may arise from the nature and gravity of the misconduct. In the latter situation, the presumption may be overcome by evidence showing an absence of adverse effect on service efficiency, in which case the agency may no longer rely solely on the presumption but must present evidence to carry its burden of proving nexus. The quantity and quality of the evidence which the agency need present in that circumstance would clearly then depend upon the nature and gravity of the particular misconduct as well as upon the strength of the showing made by the appellant in overcoming the otherwise applicable presumption.

. . . .

III. THE NEXUS ISSUE IN THIS APPEAL

Appellant's misconduct in his home was not of an egregious character or gravity from which impairment of service efficiency can be presumed. Young v. Hampton,

supra, 568 F.2d at 1258, 1260-61, 1264, 1265-66. It was, therefore, the agency's burden to present evidence tending to prove that appellant's off-duty conduct affected the efficiency of the service. This the agency failed to do. The fact that appellant's conduct may have been unlawful did not relieve the agency of its burden to establish the requisite nexus, particularly in view of limitations upon the power of the Government to intrude unnecessarily upon the discreet conduct of citizens, including Federal employees, in the privacy of their homes.

Moreover, to the extent that the criminality of appellant's conduct warrants any inference of doubt about his reliability or trustworthiness, such inference was rebutted by appellant's evidence that during the five months following the marijuana incident his job performance improved and he was recommended for a promotion. The agency offered no evidence in response to this showing by appellant, and none to support its post-hearing argument of possible "pressures and blackmail" against appellant.

Under these circumstances, we find that the agency's nexus allegation is not supported by the preponderance of the evidence. See 5 U.S.C. § 7701(c)(1)(B). . . .

CONCLUSION

Accordingly, the initial decision is hereby REVERSED, and the agency is ORDERED to cancel its removal action against the appellant. . . .

Note. The nexus requirement flows from the "efficiency of the service" cause standard in 5 U.S.C. §§ 7503 and 7513. These sections apply only to certain designated employees, i.e., nonprobationary competitive service employees and nonprobationary excepted service employees. In Merritt the Board briefly examined the prohibited personnel practices listed in 5 U.S.C. § 2302(b)(10) and concluded that this provision extended the cause standard from 5 U.S.C. §§ 7503 and 7513 to virtually all personnel actions against all employees. The agency must, therefore, satisfy the nexus requirement even in lesser adverse actions and those taken against employees other than nonprobationary competitive service and nonprobationary equivalent excepted service employees. Because of the Board's limited jurisdiction, this issue would only arise in an arbitration hearing or another administrative proceeding. See St. Amand, Probationary and Excepted Service Employee Rights in Disciplinary Actions in the Wake of Cleveland School Board v. Loudermill, The Army Lawyer, July 1985, at 1, for discussion of possible expansion of employee hearing rights due in part to 5 U.S.C. § 302(b)(10).

b. Presenting evidence of nexus. In August 1984, the MSPB decided several nexus cases that continue to be cited as the agency's burden. See particularly the following cases and those they cite: Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, aff'd, 980 F.2d 742 (1992); Beasley v. Dep't of Defense, 52 M.S.P.R. 272 (1992); Jaworski v. Department of the Army, 22 M.S.P.R. 499 (1984); Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984); Franks v. Department of Air Force, 22

M.S.P.R. 502 (1984); and Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984). Since 1984, the MSPB has reversed very few cases based on the lack of nexus. These cases should therefore be used simply for their evidentiary analysis.

These cases, like most nexus cases, are fairly fact specific while continuing to apply the guidance initially set out in Merritt v. Department of Justice. They do help to categorize somewhat the types of evidence the Board will accept as adequate proof of the required nexus. The best evidence is that which demonstrates direct impact, or misconduct, on the job site, e.g., misuse of government equipment. Sternberg v. Dep't of Defense, 52 M.S.P.R. 547 (1992). Another on-the-job effect is fellow employees afraid to work with the offending employer. See Beasley v. Dep't of Defense; Backus v. Office of Personnel Management. In many cases, that type of evidence is not available.

The second type of evidence to look for is that which reflects reasonable cause to fear impact in the future, e.g., the nature of the offense and the nature of the employee's duties lead the supervisor to lose confidence in the employee's ability to continue to perform satisfactorily. Honeycutt v. Department of Labor and Jaworski v. Department of Army. If that type evidence is not available, the final type to look for is evidence that the misconduct impacts on the organization in a broader sense, e.g., bad publicity or the need to use agency resources to deal with the misconduct. Franks v. Department of Air Force.

c. Exception: the presumption of nexus.

(1) Application of the presumption. The MSPB in Merritt v. Department of Justice clearly established the general rule that requires agencies to present evidence in every case to prove nexus by a preponderance of the evidence. The Board also recognized in Merritt that in "certain egregious circumstances" nexus could be presumed from the nature and seriousness of the misconduct. In doing so, the Board suggested that it was adopting an approach taken by the courts in Masino v. United States, 589 F.2d 1048 (Ct. Cl. 1978) and Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974).

After the Board's decision in Merritt, two U.S. Courts of Appeals rejected the presumption of nexus under any circumstances. D.E. v. Department of Navy, 707 F.2d 1049 (9th Cir. 1983) (opinion withdrawn) and Bonet v. U.S. Postal Service, 661 F.2d 1071 (5th Cir. 1981). The court of appeals for the 3d Circuit in Abrams v. Department of Navy, 714 F.2d 1219 (3d Cir. 1983), approved the presumption of nexus in egregious circumstances. The differences in the circuits caused confusion in the area until the issue was addressed by the U.S. Court of Appeals for the Federal Circuit in Hayes v. Department of Navy, 727 F.2d 1535 (Fed. Cir. 1984). The court in Hayes specifically held that nexus may be presumed in egregious circumstances, and upheld the MSPB's decision presuming nexus in that case based on the employee's conviction for assault and battery on a 10-year-old female. The Hayes decision is paramount to MSPB practice because virtually all appeals from MSPB decisions must go to the Court of Appeals for the Federal Circuit. See, Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The MSPB considers Federal Circuit decisions "controlling" on the Board, while decisions by other circuits are only "persuasive" authority. Fairall v. VA, 33 M.S.P.R. 33 (1987).

While this presumption helps the agency, it applies only in egregious circumstances. What constitutes egregious circumstances will have to be determined on a case by case basis. See Hayes at 1539, n.3 for a list of cases in which the presumption was applied. See also Graham v. U.S. Postal Service, 49 M.S.P.R. 364 (1991) and Coleman v. U.S. Postal Serv., 57 M.S.P.R. 537 (1993) (drinking on job and AWOL presumptively affect efficiency of service). The composition of the Board at the time the case is heard will have obvious bearing on the outcome of the "egregious" determination.

(2) Employee rebuttal of presumption. The presumption of nexus is rebuttable. The limited case law in this area indicates that the employee must demonstrate that the misconduct has no adverse impact on the employee's performance, no adverse impact on the performance of other employees, and no adverse impact on the organization. Abrams v. Department of Navy, 714 F.2d 1219 (3d Cir. 1983); Abrams v. Department of Navy, 22 M.S.P.R. 480 (1984); Johnson v. HHS, 22 M.S.P.R. 521 (1984); Williams v. GSA, 22 M.S.P.R. 476 (1984).

If the agency is able to prove that the employee committed an act of misconduct and that the misconduct adversely affects the efficiency of the service, it has justified taking disciplinary action. The agency must then also demonstrate the appropriateness of the specific discipline imposed.

4.10 Demonstrating the Appropriateness of the Penalty Choice. In Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), the Board issued its lead decision on how an agency should choose an appropriate penalty. The Board in Douglas provided detailed guidance concerning the scope of its review, how and when it would mitigate an agency's chosen penalty, and the relevant factors it would consider in reviewing penalties. Douglas continues to be the most important case in the area and is set forth in part below.

Douglas v. Veterans Administration
5 M.S.P.R. 280 (1981)

OPINION AND ORDER

Under 5 U.S.C. § 1205(a)(1), as enacted by the Civil Service Reform Act of 1978 ("the Reform Act"), this Board is authorized and directed to "take final action" on any matter within its jurisdiction. These cases present the question of whether that statutory power includes authority to modify or reduce a penalty imposed on an employee by an agency's adverse action, and if so, by what standards that authority should be exercised. For the reasons set out hereafter, we conclude that the Board does have authority to mitigate penalties when the Board determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. We also conclude that this authority may be

exercised by the Board's presiding officials, subject to our review under 5 U.S.C. § 7701(e)(1).

The appellants in these cases, career employees in the competitive service, were each removed by their agencies upon charges of job-related misconduct under 5 U.S.C. § 7513. In all but one case, they alleged in their appeals before this Board that the penalty imposed by the agency was too severe. The Board's presiding officials sustained the agency decisions, finding that selection of an appropriate penalty is a matter essentially committed to agency discretion and not subject to proof. The Board thereupon reopened the initial decisions to consider these issues. . . .

I. THE BOARD'S AUTHORITY TO MITIGATE PENALTIES

The Office of Personnel Management (OPM), most of the agencies, and AFGE urge that the Board lacks authority to mitigate an agency-selected penalty. They acknowledge that an agency's choice of penalty may be so disproportionate to an offense or otherwise improper as to constitute an abuse of discretion warranting reversal by the Board. However, they assert that in such cases the Board may not itself reduce or modify the penalty but must instead remand the appeal to the employing agency for selection and imposition by the agency of a substitute penalty, subject to further appeal to the Board from the agency's substituted penalty. For the Board itself to modify or reduce a penalty, they contend, would intrude upon the employing agency's managerial functions. The proponents of this position cite various Federal court decisions referring to selection of penalties as a matter within "agency" discretion; OPM also emphasizes the purpose of the Reform Act to separate managerial from adjudicatory functions in the civil service system.

The other Federal employee unions and the Acting Special Counsel, on the other hand, point to the authority previously reposed in the former Civil Service Commission to mitigate or lessen agency-imposed penalties. The Commission delegated that authority to its Federal Employee Appeals Authority (FEAA) and Appeals Review Board (ARB) for certain categories of cases, otherwise reserving such authority to the Commissioners themselves. Under Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act, it is contended, this Board as the successor agency to the Commission is vested with the same power to mitigate or lessen penalties imposed by agencies. These participants also urge that such authority is inherent in the Board's adjudicative function and is necessary to the proper exercise of the Board's statutory role as a strong, independent protector of merit system principles, including particularly the principle of "fair and equitable treatment in all aspects of personnel management. . . .

These provisions have now been succeeded by new Section 1205(a) of title 5, as enacted by the Reform Act, sec. 202(a), 92 Stat. 1122, which provides:

(a) The Merit Systems Protection Board shall--

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title . . . or any other law, rule or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order. . . .

Thus, unless "inconsistent with any provision in" the Reform Act, the functions specified as remaining with the Board under Section 202 of Reorganization Plan No. 2 of 1978, including the former Commissioner's mitigation authority, remain vested in the Board through 5 U.S.C. § 1205(a).

II. STANDARDS GOVERNING EXERCISE OF THE BOARD'S MITIGATION AUTHORITY

A. Scope of Review

Since the agency's actions in these cases were taken under Chapter 75 of Title 5, the respective agency decisions to take those actions may be sustained only if supported by a preponderance of the evidence before the Board. 5 U.S.C. § 7701(c)(1)(B). We must therefore consider whether the preponderance standard applies only to an agency's burden in proving the actual occurrence of the alleged employee conduct or "cause" (5 U.S.C. § 7513) which led the agency to take disciplinary action, or whether that standard applies as well to an agency's selection of the particular disciplinary sanction.

We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them. This is so whether the facts relate to aggravating circumstances in the individual case, the employee's past work record, nature of the employee's responsibilities, specific effects of the employee's conduct on the agency's mission or reputation, consistency with other agency actions and with agency rules, or similar factual considerations which may be deemed relevant by the agency to justify the particular punishment. Section 7701(c)(1) admits of no ambiguity in this regard, since an agency's adverse action "decision" necessarily includes selection of the particular penalty as well as the determination that some sanction was warranted. The statute clearly requires that all facts on which such agency decision rests must be supported by the standard of proof set out therein.

It is also clear, however, that the appropriateness of a penalty, while depending upon resolution of questions of fact, is by no means a mere factual determination. Such a decision "involves not only an ascertainment of the factual circumstances surrounding the violations but also the application of administrative judgment and discretion." Kulkin v. Bergland, 626 F.2d 181, 185 (1st Cir. 1980). It is well established that "assessment of penalties by the administrative agency is not a factual finding but the exercise of a discretionary grant of power." Beall Const. Co. v. OSHRC, 507 F.2d 1041, 1046 (8th Cir. 1974). Thus, an adverse action may be adequately supported by evidence of record but still be arbitrary and capricious, for instance if there is no rational connection between the grounds charged and the interest assertedly served by the sanction. . . .

The evidentiary standards of 5 U.S.C. § 7701(c) specify the quantity of evidence required to establish a controverted fact. As procedural devices for allocating the risk of erroneous factual findings those standards are inapposite to evaluating the rationality of non-factual determinations reached through the exercise of judgment and discretion. For such determinations, the characteristic standard of review is the arbitrary-or-capricious, or abuse-of-discretion, standard. . . .

By the standard, the Commission reviewed agency penalties to determine whether they were "clearly excessive" or were "arbitrary, capricious, or unreasonable. . . ."

In focusing not merely on whether a penalty was too harsh or otherwise arbitrary but also on whether it was "unreasonable," the Commission's standard appears considerably broader than that generally employed by the Federal courts. Both the Court of Claims and the Courts of Appeals have characteristically reviewed Commission-approved penalties only to determine whether they were so disproportionate to the offense as to amount to an abuse of discretion or whether they exceeded the range of sanctions permitted by statute, regulation, or an applicable table of penalties. The Commission's broad standard of "unreasonableness," encompassing greater latitude of review than is typically employed by the appellate courts in appeals from Commission or Board decisions, accords a measure of scope to the Commission's and now this Board's independent discretionary authority which the courts have recognized.

The Board's marginally greater latitude of review compared to that of the appellate courts does not, of course, mean that the Board is free simply to substitute its judgment for that of the employing agencies. Management of the Federal work force and maintenance of discipline among its members is not the Board's function. Any margin of discretion available to the Board in reviewing penalties must be exercised with appropriate deference to the primary discretion which has been entrusted to agency management, not to the Board. Our role in this area, as in others, is principally to assure that managerial discretion has been legitimately invoked and properly exercised.

At all events the Board must exercise a scope of review adequate to produce results which will not be found "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" when reviewed by appellate courts under Section 7703(c). This is the identical standard (prescribed) by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To assure that its decisions meet that standard under Section 7703(c), the Board must, in addition to determining that procedural requirements have been observed, review the agency's penalty selection to be satisfied (1) that on the charges sustained by the Board the agency's penalty is within the range allowed by law, regulation, and any applicable table of penalties, and (2) that the penalty "was based on a consideration of the relevant factors and [that] . . there has [not] been a clear error of judgment." . . .

Therefore, in reviewing an agency-imposed penalty, the Board must at a minimum assure that the Overton Park criteria for measuring arbitrariness or capriciousness have been satisfied. In addition, with greater latitude than the appellate courts are free to exercise, the Board like its predecessor Commission will consider whether a penalty is clearly excessive in proportion to the sustained charges, violates the principle of like penalties for like offenses, or is otherwise unreasonable under all the relevant circumstances. In making such determination the Board must give due weight to the agency's primary discretion in exercising the managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.

Before turning to matters which may be pertinent in determining whether the agency's selection of a penalty was based on consideration of the relevant factors, it seems advisable to address one further point which has been a source of much semantic muddle. The appropriateness of a particular penalty is a separate and distinct question from that of whether there is an adequate relationship or "nexus" between the grounds for adverse action and "the efficiency of the service." The establishment of such a relationship between the employee's conduct and the efficiency of the service, while adequate to satisfy the general requirement of Section 7513(a) that no action covered by Subchapter II of Chapter 75 may otherwise be taken, "is not sufficient to meet the statutory requirement that removal for cause promote the efficiency of the service." . . . The appropriateness of a particular Subchapter II penalty, once the alleged conduct and its requisite general relationship to the efficiency of the service have been established, is "yet a third distinct determination." Young v. Hampton, 568 F.2d 1253, 1264 (7th Cir. 1977). . . .

Before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case. Thus, while the efficiency of the service is the ultimate criterion for determining both

whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and must be separately considered.

B. Relevant Factors In Assessing Penalties

A well developed body of regulatory and case law provides guidance to agencies, and to the Board, on the considerations pertinent to selection for an appropriate disciplinary sanction. Much of that guidance is directed to the fundamental requirement that agencies exercise responsible judgment in each case, based on rather specific, individual considerations, rather than acting automatically on the basis of generalizations unrelated to the individual situation. OPM's rules on this subject, like those of the Commission before it, emphasize to agencies that in considering available disciplinary actions, "There is no substitute for judgment in selecting among them." Further, OPM specifically counseled agencies that:

> Any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense; this is particularly true of an employee who has a previous record of completely satisfactory service. An adverse action, such as suspension, should be ordered only after a responsible determination that a less severe penalty, such as admonition or reprimand, is inadequate.
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> . . .
>
> . . . Agencies should give considerations to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense but such other matters as mitigating circumstances, the frequency of the offense, and whether the action accords with justice in the particular situation.

Section 7513(b)(4) of Title 5 requires that written agency decisions taking adverse actions must include "the specific reasons therefor." While neither this provision nor OPM's implementing regulation, 5 C.F.R. 752.404(f), requires the decision notice to contain information demonstrating that the agency has considered all mitigating factors and has reached a responsible judgment that a lesser penalty is inadequate, a decision notice which does demonstrate such reasoned consideration may be entitled to greater deference from the Board as well as from the courts. Moreover, aggravating factors on which the agency intends to rely for imposition of an enhanced penalty, such as a prior disciplinary record, should be included in the advance notice of charges so that the employee will have a fair opportunity to respond to those alleged factors before the agency's deciding official, and the decision notice should explain what weight was given to those factors in reaching the agency's final decision.

Court decisions and OPM and Civil Service Commission issuances have recognized a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Without purporting to be exhaustive, those generally recognized as relevant include the following:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee's past disciplinary record;

(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;

(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

(10) potential for the employee's rehabilitation;

(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Not all of the factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while

others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process is not to insist that the balance be struck precisely where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the Board's review of any agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

In considering whether the agency's judgment was reasonably exercised, it must be borne in mind that the relevant factors are not to be evaluated mechanistically by any preordained formula. For example, the principle of "like penalties for like offenses" does not require mathematical rigidity or perfect consistency regardless of violations in circumstances or changes in prevailing regulations, standards, or mores. This consideration is redolent of equal protection concepts, also reflected in the merit system principle calling for "fair and equitable treatment" of employees and applicants in all aspects of personnel management. As such, this principle must be applied with practical realism, eschewing insistence upon rigid formalism so long as the substance of equity in relation to genuinely similar cases is preserved. OPM has required that agencies "should be as consistent as possible" when deciding on disciplinary actions, but has also cautioned that "surface consistency should be avoided" in order to allow for consideration of all relevant factors including "whether the action accords with justice in the particular situation." Similarly, agency tables of penalties should not be applied so inflexibly as to impair consideration of other factors relevant to the individual case.

Lastly, it should be clear that the ultimate burden is upon the agency to persuade the Board of the appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained under Section 7701(c)(1) only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred and that such misconduct affects the efficiency of the service.

In many cases the penalty, as distinct from underlying conduct alleged by the agency, will go unchallenged and need not require more than prima facie justification. An agency may establish a prima facie case supporting the appropriateness of its penalty by presenting to the Board evidence of the facts on which selection of the penalty was based, a concise statement of its reasoning from those facts or information otherwise sufficient to show that its reasoning is not on its face inherently irrational, and by showing that the penalty conforms with applicable law and regulation. When no issue has been raised concerning the penalty, such a prima facie case will normally suffice to meet also the agency's burden of persuasion on the appropriateness of the penalty. However, when the appellant challenges the severity of the penalty, or when the Board's presiding official perceives genuine issues of justice or equity casting doubt on the appropriateness of the penalty selected by the agency, the agency will be called upon to present such further evidence as it may choose to rebut the appellant's challenge or to satisfy the presiding official.

Whenever the agency's action is based on multiple charges some of which are not sustained, the presiding official should consider carefully whether the sustained charges merited the penalty imposed by the agency. In all cases in which the appropriateness of the penalty has been placed in issue, the initial decision should contain a reasoned explanation of the presiding official's decision to sustain or modify the penalty, adequate to demonstrate that the Board itself has properly considered all relevant factors and has exercised its judgment responsibility.

III. APPLICATION TO APPELLANTS

[Board discusses facts of 5 cases.]

This is the final order of the MSPB in these appeals.

The Board in Douglas noted that the choice of penalty will largely be left to agency discretion, but that it will review the agency's choice to ensure consistency with law, rule, regulation, agency table of penalties, and consideration of other relevant factors. See also Uske v. U.S. Postal Svc., 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); Betz v. General Services Admin., 55 M.S.P.R. 424 (1992); Schulmeister v. Dep't of Navy, 46 M.S.P.R. 13 (1990), aff'd, 928 F.2d 411 (Fed. Cir. 1991). The other relevant factors set out in Douglas have become known as the "Douglas factors."

Note 1. The Board explicitly stated in Douglas that its list of relevant factors was not exhaustive and that the agency need not address the listed factors mechanically. The Court of Appeals for the Federal Circuit approved this analysis in Nagel v. Department of Health and Human Services, 707 F.2d 1384 (Fed. Cir. 1983). See also Chauvin v. Dep't of Navy, 59 M.S.P.R. 675 (1993); Ingram v. Dep't of Air Force, 53 M.S.P.R. 101, aff'd 980 F.2d 744 (1992).

Note 2. Because the appropriateness of the agency's penalty choice is part of the agency's burden of proof, the agency must present evidence concerning its penalty choice even in the absence of an employer challenge to the penalty. Parsons v. Department of Air Force, 707 F.2d 1406 (D.C. Cir. 1983); Mertens v. Dep't of Navy, 61 M.S.P.R.157 (1994).

Note 3. What has developed into the most important "Douglas factor" is consistency of the penalty with the agency's table of penalties. The Army's current table of penalties is published as Table 1-1 in Change 5 to AR 690-700, Chapter 751 (15 September 1989). The MSPB has repeatedly held that consistency with an agency's table of penalties is a relevant factor in reviewing the appropriateness of a penalty. See, e.g., Peterson v. Dep't of Transportation, 54 M.S.P.R. 178 (1992).

a. One issue of concern is when the offense committed is not listed on the table of penalties. Most tables suggest that in such a case the supervisor should look to an offense found on the table that is similarly seriousness. The 9th circuit approved this approach in McLeod v. Department of Army, 714 F.2d 918 (9th Cir. 1983); however, that court no longer hears appeals from MSPB decisions.

b. Is a supervisor limited to a penalty within the range set out in the table of penalties? Most agencies establish their tables as guides which are not mandatory. The ability to impose a penalty in excess of that on the table of penalties was recognized in Weston v. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983). The agency always has the burden to justify why the recommended penalty in the table of penalties is inadequate.

c. Most tables of penalties recommend penalties for various offenses based on whether the misconduct is the first, second, or third offense. For purposes of determining whether the misconduct is the first or later offense, all prior misconduct, not just offenses of the same type, may be considered. Villela v. Department of Air Force, 727 F.2d 1574 (Fed. Cir. 1984). An employee may challenge the previous disciplinary action being used to enhance the punishment, depending on the circumstances surrounding the agency's processing of that earlier action. If the employee had been informed of the previous disciplinary action in writing, had an opportunity for a substantive review of the action by a higher authority than the one who took the action, and the action was made a matter of record, then the agency can use that prior disciplinary action to enhance the punishment for the correct misconduct, and the employee may not relitigate the prior action. Huettner v. Dep't of Army, 54 M.S.P.R. 472 (1992); Ballew v. Department of Army, 36 M.S.P.R. 400 (1988); Bolling v. Department of Air Force, 9 M.S.P.R. 335 (1981). Failure to meet these three requirements does not preclude the agency's use; it merely allows the employee to challenge the merits of the prior action during the current action. Parsons v. Department of the Air Force, 21 M.S.P.R. 438 (1984).

4.11 Mitgation of Penalty Choice: Following Douglas, the general rule was deference to the agency in penalty selection. Penalty selection was reviewed under an abuse of discretion standard. Uske v. U.S. Postal Serv., 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir.

1995); Schulmeister v. Dep't of Navy, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991); Miguel v. Dep't of Army, 727 F.2d 1081 (Fed. Cir. 1984).

a. *De Minimis* misconduct: . In a recent line of cases, however, the Board has mitigated numerous penalties despite the AJ's affirmation of the agency charges and chosen penalty. See, e.g., Matson v. Dep't of Army, 32 M.S.P.R. 168 (1987); Casia v. Dep't of Army, 62 M.S.P.R. 130 (1994); Taylor v. Dep't of Justice, 60 M.S.P.R. 686 (1994).

SKATES V. DEPARTMENT OF ARMY
69 M.S.P.R. 366 (1996)

On remand from the Federal Circuit, the Board mitigated the removal of a WG-8 Cook at West Point for theft of government property (left over food) to a 14 day suspension. The Board took into account the *de minimus* value of the food taken, the employee's 17 years of good service, and his dedication to his position as evidenced by his having walked (all the roads were closed) to work during the blizzard of 1993, and then working double shifts, to cook for the cadets.

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b. Not all agency charges sustained. Board will now apply reasonable penalty standard to make penalty selection and direct agency to implement penalty selected by the Board.

WHITE V. U.S. POSTAL SERVICE
71 M.S.P.R. 521 (1996)

While acknowledging that it must accord proper deference to an agency's determination as to appropriate penalties, when not all agency charges are sustained, the agency penalty determination made by the agency no longer stands and MSPB will independently balance the relevant *Douglas* factors to determine the appropriate penalty. The Board further indicated that it will consider any statements made by deciding officials concerning what penalties they would have imposed for the sustained charges. This was a split decision and the dissent of Member Amador strongly argued that the Board should continue to accord deference to the agency's choice of penalty where not all charges are sustained.

If the agency successfully proves that the employee committed the act of misconduct, that discipline is for just and proper cause, and that the penalty imposed is appropriate, then the adverse action should be sustained. The only remaining hurdle that could cause reversal of the action is the agency's failure to follow proper procedures.

4.12 Following Proper Procedures. The procedural requirements for disciplinary actions were discussed in Section I of this chapter. Procedures are mandated by statute and implementing regulations of OPM and the employing agency. Failure to follow these procedures may, but does not necessarily, result in reversal of the adverse disciplinary action. Only harmful error warrants reversal of the adverse action. See 5 U.S.C.§ 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).

The Court of Appeals for the Federal Circuit has determined that there is no per se harmful procedural error, even for procedures mandated by statute. Accord Handy v. U.S. Postal Service, 754 F.2d 335 (Fed. Cir. 1985) (employee allowed written but no oral reply); Baracco v. Department of Transportation, 735 F.2d 488 (Fed. Cir. 1984) (employee given 6 instead of 7 days advance notice). The Board will reverse actions that fail to satisfy minimum Constitutional due process. Polite v. Dep't of Navy, 49 M.S.P.R. 653 (1991). Generally, however, the employee must show "harmful" error by demonstrating the procedural defect would have affected the agency's decision. Kranz v. Dep't of Justice, 62 M.S.P.R. 630 (1994); Stephen v. Dep't of Air Force, 47 M.S.P.R. 672 (1991).

4.13 Indefinite Suspension Pending Disposition of Criminal Charges.

a. General. The MSPB and the courts have recognized a Federal agency's ability to indefinitely suspend an employee pending disposition of criminal charges. Richardson v. U.S. Custom Serv., 47 F.3d 415 (Fed. Cir. 1995); Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed Cir. 1993); Brown v. Department of Justice, 715 F.2d 662 (D.C. Cir. 1983); Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976); Smith v. Gov't Printing Office 60 M.S.P.R. 450 (1994); Martin v. Department of Treasury, 12 M.S.P.R. 12 (1982). An excellent discussion of the basis for this adverse disciplinary action is found in Martin v. Department of Treasury, which is set forth in part below.

Martin v. Department of Treasury
12 M.S.P.R. 12 (1982)

[Footnotes and other selected portions omitted]

OPINION AND ORDER

Appellant was indefinitely suspended from his position by his employing agency. The indefinite suspensiony . . . taken pursuant to the shortened notice period provided for by 5 U.S.C. § 7513(b)(1) where ". . . there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, . . ."

I. STATEMENT OF FACTS

Appellant Martin was indefinitely suspended from his position as Supervisory Customs Patrol Officer by the United States Customs Service, Mobile, Alabama. Three reasons, all based upon the same occurrence, were given for the action: (1) unauthorized interception of oral communications; (2) conduct prejudicial to the best interest of the service; and (3) interfering with the rights of another.

. . . .

The agency based its action on the search warrants and the preliminary report, and also cited its need for further investigation into appellant's involvement. The preliminary report also states that the matter had been referred to the U.S. Attorney's Office for possible action. The presiding official sustained the action, and Martin has petitioned for review.

. . . .

II. ISSUES

By order dated March 2, 1981, the Board identified issues as pertinent to th[is] appeal, . . . under what circumstances is an indefinite suspension initially valid; under what circumstances does an initially valid suspension become invalid; the manner in which an employee can obtain termination of an indefinite suspension if warranted; and, related sub-issues.

III. DISCUSSION

It would be helpful, at the outset, to examine the definition of the term "suspension" which is set forth at 5 U.S.C. § 7501(2). That provision defines a suspension, for the first time statutorily, as "the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay." According to the legislative history of the Civil Service Reform Act, (C.S.R.A.), Congress' intent in enacting this provision was to adopt, rather than change, the definition of "suspension" utilized by the former Civil Service Commission (C.S.C.). The former C.S.C. had defined a suspension as "an action placing an employee in a temporary nonduty and nonpay status for disciplinary reasons or for other reasons pending inquiry." Former FPM Supp. 752-1, S1-6(a). (Emphasis supplied.)

The most essential criterion of an action, if it is to meet the definition of "suspension" set forth at 5 U.S.C. § 7501(2), is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension. Although the time duration of the action may not be determinable, an indefinite suspension continuing beyond the given point of termination would be improper. See Erdwein v. United States, 215 Ct.

Cl. 54, at 65, n.8 (1977). Such an action imposed with no ascertainable end in sight is not sustainable as a suspension, because of failure to meet the criterion of temporariness.

. . .

Cuellar v. United States Postal Service, MSPB Order No. SF075299045 at 6 (November 13, 1981), "[i]n passing the Reform Act, Congress maintained the 'crime exception' now contained in 5 U.S.C. § 7513(b)(1) as the only instance in which an agency's need to protect its employees, property, and/or reputation could outweigh the employee's right to 30 days' notice [of an adverse action]." Courts have examined, and given approval to, suspension actions taken on shortened notice and based on examinations into charged criminal conduct. See Coleman v. United States Postal Service, No. 79-4751 (S.D. N.Y. May 21, 1980), (approving, "[a]s a practical matter," an indefinite suspension based upon an arrest on a serious charge and an arraignment on the basis of a felony complaint); Jankowitz v. United States, 533 F.2d 538 at 543 (Ct. Cl. 1976), (holding "eminently fair" an indefinite suspension based upon an indictment because "[r]ecognizing that he might well have been acquitted, the agency even-handedly rejected the 'knee-jerk' approach, giving plaintiff a chance to save his job if exonerated.")

Another reason courts have approved of indefinite suspensions based upon examinations into criminal charges was set forth in Polcover v. Department of the Treasury, 477 F.2d 1223, 1231-1232 (D.C. Cir.), cert. denied, 414 U.S. 1001 (1973). Quoting from Silver v. McCamey, 221 F.2d 873, 874-875 (D.C. Cir. 1955), the court specifically warned of the dangers of subjecting an employee to an administrative hearing while criminal action is pending:

> [we] agree . . . that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.

See also Peden v. United States, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

As has been stated, indefinite suspensions are based upon "reasonable cause." "[R]easonable cause" is virtually synonymous with the "probable cause" which is necessary to support a grand jury indictment.

An indefinite suspension based on reasonable cause to believe that a crime has been committed for which imprisonment may be imposed must meet the "efficiency of the service" standard of 5 U.S.C. § 7511(a). Thus, there must be a nexus between the crime the employee is reasonably believed to have committed and his position.

. . . .

Another element of the agency's proof is the reasonableness of its penalty. Douglas v. Veterans Administration, MSPB Docket Number AT075299006 (April 10, 1981). Thus, agencies must show that a lesser penalty would be ineffective under the circumstances of the particular cases.

Indefinite suspensions are not based upon provable misconduct but upon the examination into that misconduct. Jankowitz v. United States, 533 F.2d 538 (Ct. Cl. 1976). Therefore, an indefinite suspension may be found to have been reasonable when imposed, although facts later developed may cause the Board to find that an agency acted unreasonably in failing or refusing to vacate the action. In this regard, however, the Board notes that before an agency or before the Board, the bare fact of a subsequent acquittal does not demonstrate that an indefinite suspension had been unjustified. An acquittal because a jury or judge was not convinced beyond and to the exclusion of all "reasonable doubt," Speiser v. Randall, 157 U.S. 513 (1978), is not binding on an administrative agency, Alsbury v. United States Postal Service, 192 F. Supp. 71 (C.D. Calif. 1975), aff'd, 530 F.2d 852 (9th Cir. 1976), because the standard of proof before the Board is the "preponderance of the evidence." The Board concludes that where, after a full review of the attendant facts and circumstances, an indefinite suspension is found to have been reasonably imposed and maintained, the Board will sustain the action.

Because a suspension is by definition temporary, an indefinite suspension must have a determinable condition subsequent which will bring the action to an end. Accordingly, the Board's order sustaining the action would explicitly or implicitly mandate that the agency move expeditiously, and that the suspension terminate upon the occurrence of the condition subsequent. Noncompliance with these terms of the order could be brought to the Board's attention via 5 C.F.R. § 1201.181, which provides:

> Any party may petition the Board for enforcement of a final decision issued under the Board's appellate jurisdiction. Submission of this petition shall be made to the field office which rendered the initial decision. The petition shall specifically set forth the reasons why the petitioning party believes there is non-compliance.

The Board agrees that this provision gives an appellant the procedural opportunity to argue that conditions have occurred which should have brought about a termination of his suspension.

Having set forth the principles which the Board must use to determine the validity of indefinite suspensions, we will now apply them to the specific cases before us.

IV. APPLICATION

Appellant Martin was indefinitely suspended . . . upon charges of unauthorized interception of oral communications, conduct prejudicial to the best interest of the service, and interfering with the rights of another. The agency took the position that the action was appropriate in view of Martin's role as supervisory law enforcement official in an agency (Customs Service) which has a mission of law enforcement.

The record indicates that the agency had received only a preliminary investigative report and that further investigation, or further analysis of the information and materials obtained was ongoing. The Board finds that this continuing investigation, taken together with the search warrants, the actual evidence obtained, and the fact that the matter was referred to the U.S. Attorney for investigation and possible action, provides sufficient basis for "reasonable cause." While an investigation should not per se form the basis for an indefinite suspension, it may provide such a basis where, as is the case herein, it is accompanied by evidence which is sufficient to afford "reasonable cause to believe. . . ." Further, the ongoing agency investigative process and the referral to the U.S. Attorney support the "temporary" nature of the suspension. Finally, the Board finds the suspension action reasonable, Douglas, supra, and also concludes that the action was taken for such cause as will promote the efficiency of the service, in view of appellant's position as a law enforcement officer. Accordingly, the indefinite suspension action taken against Martin is sustained.

Note 1. An indefinite suspension pending disposition of criminal charges must be based on reasonable cause to believe that the employee committed a crime for which imprisonment can be imposed. See 5 U.S.C. § 7513(b)(1). This section of Title 5 is the same one relied upon to shorten the normal 30-day notice period to 7 days.

Note 2. Most cases rely upon an indictment to establish the requisite reasonable cause. Jankowitz. See also Pararas-Carayannis v. Dep't of Commerce, 9 F.3d 955 (Fed. Cir. 1993); Dunnington v. Dep't of Justice, 956 F.2d 1151 (Fed. Cir. 1992); Smith v. Gov't Printing Office, 60 M.S.P.R. 450 (1994); Crespo v. U.S. Postal Service, 53 M.S.P.R. 125 (1992); and Johnson v. Department of Health and Human Services, 22 M.S.P.R. 521 (1984). An indictment is not, however, the only evidence providing the necessary reasonable cause. An arrest or an investigation standing alone is generally insufficient to establish reasonable cause. Phillips v. Dep't of Veterans Affairs, 58 M.S.P.R. 12 (1993), aff'd, 17 F.3d 1443 (Fed. Cir. 1994); Martin; and Larson v. Department of Navy, 22 M.S.P.R. 260 (1984). A combination of circumstances, however, including an arrest or investigation may suffice. Accord Gonzales v. Department of the Treasury, 37 M.S.P.R. 589 (1988); Rampado v. U.S. Customs Service, 28 M.S.P.R. 189 (1985); Martin; Honeycutt v. Department of Labor, 22 M.S.P.R. 491 (1984); Backus v. Office of Personnel Management, 22 M.S.P.R. 457 (1984). See also Dunnington v. Department of Justice

and OPM, 45 M.S.P.R. 305 (1990) (finding arrest based on arrest warrant issued by neutral magistrate based on finding of probable cause sufficient).

b. Nature of the action. This indefinite suspension is a temporary action and requires that there be a determinable condition subsequent that will terminate the action. If the suspension is imposed pending disposition of criminal charges, therefore, the agency must promptly terminate the suspension when the charges are resolved. Newbold v. Dep't of Treasury, 58 M.S.P.R. 532 (1993); Drake v. Veterans Administration, 26 M.S.P.R. 34 (1985).

An indefinite suspension is viewed as a suspension for more than 14 days and thus is treated as a true adverse action for all procedural and substantive purposes. This requires that the agency prove the nexus between the indictment and the efficiency of the service; demonstrate the appropriateness of this penalty choice; and follow the procedures for imposing a true adverse action. Because 5 U.S.C. § 7513(b)(1) is the basis for this type suspension and for reducing the notice period from 30 to 7 days, only a 7-day notice should be required in these actions.

c. Action upon resolution of criminal charges. The agency may not continue the suspension after the employee is acquitted, the charges are dismissed, or the employee is convicted. The agency must promptly decide then to reinstate the employee and/or to institute adverse action procedures. Newbold v. Dep't of Treasury, 58 M.S.P.R. 532 (1993); Covarrubias v. Department of Treasury, 23 M.S.P.R. 458 (1984).

Acquittal or dismissal of the charges does not necessarily entitle the employee to reinstatement because the agency may be able to prove the underlying misconduct by the lower administrative standard - preponderance of the evidence. Rodriqnez-Ortiz v. Department of Army, 46 M.S.P.R. 546 (1991); Covarrubias; Eilertson v. Department of Navy, 23 M.S.P.R. 152 (1984). The Supreme Court has reaffirmed the propriety of this type of administrative action following unsuccessful criminal action in United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).

d. Effect of reinstatement on the original suspension. The critical issue arising upon reinstatement of an employee after acquittal or dismissal of charges, concerns the employee's entitlement to back pay for the period of suspension.

The Court of Claims in Jankowitz held that the employee's acquittal and subsequent reinstatement did not entitle the employer to back pay, unless the employee can demonstrate that the suspension was unjustified or unwarranted when it was imposed or during the period it was in effect. This decision was based on the Back Pay Act, codified at 5 U.S.C. ' 5596, which permits back pay only if the employee had been subjected to an unwarranted or unjustified personnel action.

The Court of Appeals for the Federal Circuit (CAFC) addressed the issue in Wiemers v. Merit Systems Protection Board, 792 F.2d 1113 (1986) and affirmed the Jankowitz rationale. It has recently reaffirmed the denial of back pay when an indefinite suspension was lifted, but was

justified when imposed. Jones v. Dep't of Navy, 51 M.S.P.R. 607 (1991), aff'd, 978 F.2d 1223 (Fed. Cir. 1992)

Most recently, the CAFC held that an agency has discretion to grant or deny back pay following an indefinite suspension. In Richardson v. U.S. Custom Serv., 47 F.3d 415 (Fed. Cir. 1995), the CAFC reviewed the denial of back pay to customs agents who were suspended based on an indictment and later reinstated following acquittal of all charges. It found "the agency is neither required to nor precluded from making the reinstatement with back pay retroactive to the date of the suspension. *Id.* at 421. In so finding, the CAFC made reinstatement decisions nonreviewable by the MSPB (since no appealable action is involved, there is no jurisdiction).

4.14 Constitutional Considerations. The focus of this section has been on the statutory and regulatory provisions governing employee discipline. There are, however, significant constitutional concerns in the substantive aspects of discipline, as there were in the procedural execution of discipline. This paragraph will address several important questions of constitutional dimension in substantive rights.

a. Fifth Amendment. Federal employees have the same fifth amendment rights, including the rights against self-incrimination, as all other persons in the United States. Two general consequences flow from that right. First, an employee may not be disciplined for properly invoking his or her privilege against self-incrimination. Second, later criminal prosecution cannot constitutionally use statements coerced from an employee in an earlier disciplinary investigation by threat of discipline for failure to answer questions. Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973); Peden v. United States, 512 F.2d 1099 (Ct. Cl. 1974); Weston v. Department of Housing and Urban Development, 724 F.2d 943 (Fed. Cir. 1983).

These courts, while recognizing the employees' constitutional rights, mapped out a clear course describing how to discipline an employee in this situation. If an employee properly invokes the fifth amendment privilege in refusing to answer a work-related question by the employer, the employer should advise the employee first that the employee is subject to disciplinary action for refusal, and second, that the reply, and its fruits, cannot be used in a criminal proceeding. Following this court-suggested course of action results in a use immunity by operation of law.

These steps are necessary only if the employee asserts a proper fifth amendment privilege. The employee's refusal to answer the employer's question for fear of disciplinary action, not criminal action, is not a proper fifth amendment invocation. Devine v. Goodstein, 680 F.2d 13 (D.C. Cir. 1983).

b. First Amendment. When an employee alleges that discipline was imposed in retaliation for exercising a first amendment free speech right, two issues commonly arise. First, is the speech at issue constitutionally protected? Second, if the speech is constitutionally protected

and it is a substantive part of the reason for the disciplinary action, is reversal of the disciplinary action required?

(1) Constitutionally protected speech. The Supreme Court in Pickering v. Board of Education of Township High School, 391 U.S. 563 (1968) established the framework for deciding what speech is constitutionally protected in a public employment context. That landmark decision continues to be the starting point for any first amendment analysis in connection with free speech and public employment. The decision is set out in part below.

Pickering v. Board of Education of Township High School
391 U.S. 563 (1968)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the relevant Illinois statute, Ill. Rev. Stat., c. 122, § 10-22.4 (1963), that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill. 2d 568, 225 N.E.2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. 389 U.S. 925 (1967). For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to

build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor . . . that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the "motives, honesty, integrity, truthfulness, responsibility and competence" of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment "controversy, conflict and dissension" among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was "detrimental to the best interests of the schools." Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his

acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection. In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Wieman v. Updegraff, 344 U.S. 183 (1952); Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." Keyishian v. Board of Regents, supra, at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that "the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience." Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made "with knowledge that [they were] . . false or with reckless disregard of whether [they were] . . . false or not," New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)-(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV

The public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment--is so great that it has been held that a State cannot authorize the recovery of damages by a

public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); St. Amant v. Thompson, 390 U.S. 727 (1968). Compare Linn v. United Plant Guard Workers, 383 U.S. 53 (1966). The same test has been applied to suits for invasion of privacy based on false statements where a "matter of public interest" is involved. Time, Inc. v. Hill, 385 U.S. 374 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

. . . .

Note 1. The Supreme Court, in Connick v. Myers, 461 U.S. 138 (1983), reexamined Pickering in a Federal employment context. The Court reemphasized that determining if speech is constitutionally protected requires balancing the employee's right, as a citizen, to comment on

matters of public concern, against the Government's interest, as an employer, to promote the efficiency of the service. Connick noted, however, that before getting into the balancing test, a threshold determination must be made that the speech is on a matter of public concern and not on a purely employment matter. If the speech is not on a matter of public concern, there is generally no first amendment protection. Henry v. Department of Navy, 902 F.2d 949 (Fed. Cir. 1990); Barnes v. Small, 840 F.2d 972 (D.C. Cir. 1988); Mings v. Department of Justice, 813 F.2d 384 (Fed. Cir. 1987).

Note 2. The most recent public employee first amendment decision by the Supreme Court is Rankin v. McPherson, 483 U.S. 378 (1987), in which the court reversed the firing of a clerk who had remarked to a co-worker, upon learning of the assassination attempt on President Reagan, "if they go for him again, I hope they get him." The court found that the statement was a matter of public concern and that, given the context of the statements, the employee's interest in expression outweighed the potential harm to Government interests. For more recent applications of the federal bar to alleged First Amendment violations, see Hamlet v. United States, 63 F.3d 1097 (Fed. Cir. 1995) (finding allegations of 1st Amendment denial are insufficient to invoke jurisdiction of court absent specific statutory authority); Gergick v. Austin, 997 F.2d 1237, 1239 (8th Cir.1993) (the Civil Service Reform Act contains the exclusive remedy for Whistleblower Protection Act claims), *cert. denied*, 114 S. Ct. 1536 (1994).

Note 3. A major free speech case arising out of the much publicized Federal air traffic controller strike is Brown v. Federal Aviation Administration, 735 F.2d 543 (Fed. Cir. 1984).

In Brown, an FAA supervisor addressed a group of his striking air traffic controllers at the union hall, and advised them that if they stayed together, they would win. These remarks were videotaped and later broadcast nationally on television. Brown also told a reporter that he supported some of the strike demands. The court reviewed Brown's firing, which had been upheld by the MSPB, and considered whether his remarks were constitutionally protected. The court recognized that the strike was a matter of public concern, but determined that Brown's remarks were only tangentially related to that concern. Applying the balancing test from Pickering, the court found that the timing of the remarks, at the beginning of the strike, and Brown's position as a supervisor, from whom management should reasonably expect loyalty, justified disciplinary action. The court did, however, direct the MSPB to mitigate the penalty based on the Douglas criteria.

(2) Impact of first amendment violation. If, using the balancing test of Pickering and Connick, the court concludes that the speech at issue is constitutionally protected, does that alone require reversal of the disciplinary action? The short answer is "no." The employee has the additional burden of showing that the protected speech was a substantial or motivating factor in the employer's decision to discipline.

Even if the employee can demonstrate the connection, the Supreme Court's controversial decision in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), allows the agency employer to defeat the employee's claim, if it can prove by a preponderance of the evidence that it would have taken the same action absent the employee's protected speech (mixed motive analysis).

The Mt. Healthy decision has had a tremendous impact not only in first amendment cases but several other areas as well, e.g., in Special Counsel actions and in the equal employment opportunity area. Because of its significant impact in all of these areas, the decision is set out in part below.

Mt. Healthy City School District Board of Education v. Doyle
429 U.S. 274 (1977)

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Doyle sued petitioner Mt. Healthy Board of Education in the United States District Court for the Southern District of Ohio. Doyle claimed that the Board's refusal to renew his contract in 1971 violated his rights under the First and Fourteenth Amendments to the United States Constitution.

. . . .

Doyle was first employed by the Board in 1966. He worked under one-year contracts for the first three years, and under a two-year contract from 1969 to 1971. In 1969 he was elected president of the Teachers' Association, in which position he worked to expand the subjects of direct negotiation between the Association and the Board of Education. During Doyle's one-year term as president of the Association, and during the succeeding year when he served on its executive committee, there was apparently some tension in relations between the Board and the Association.

Beginning early in 1970, Doyle was involved in several incidents not directly connected with his role in the Teachers' Association. In one instance, he engaged in an argument with another teacher which culminated in the other teacher's slapping him. Doyle subsequently refused to accept an apology and insisted upon some punishment for the other teacher. His persistence in the matter resulted in the suspension of both teachers for one day, which was followed by a walkout by a number of other teachers, which in turn resulted in the lifting of the suspensions.

On other occasions, Doyle got into an argument with employees of the school cafeteria over the amount of spaghetti which had been served him; referred to students, in connection with a disciplinary complaint, as "sons of bitches"; and made an obscene gesture to two girls in connection with their failure to obey commands made in his capacity as cafeteria supervisor. Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station. It was the Board's consideration of this incident which the court below found to be a violation of the First and Fourteenth Amendments.

In February 1971, the principal circulated to various teachers a memorandum relating to teacher dress and appearance, which was apparently prompted by the view of some in the administration that there was a relationship between teacher appearance and public support for bond issues. Doyle's response to the receipt of the memorandum--on a subject which he apparently understood was to be settled by joint teacher-administration action--was to convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item. Doyle subsequently apologized to the principal, conceding that he should have made some prior communication of his criticism to the school administration.

Approximately one month later the superintendent made his customary annual recommendations to the Board as to the rehiring of nontenured teachers. He recommended that Doyle not be rehired. The same recommendation was made with respect to nine other teachers in the district, and in all instances, including Doyle's, the recommendation was adopted by the Board. Shortly after being notified of this decision, respondent requested a statement of reasons for the Board's actions. He received a statement citing "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships." That general statement was followed by references to the radio station incident and to the obscene-gesture incident.

The District Court found that all of these incidents had in fact occurred. It concluded that respondent Doyle's telephone call to the radio station was "clearly protected by the First Amendment," and that because it had played a "substantial part" in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay. . . . The Court of Appeals affirmed in a brief per curiam opinion. 529 F.2d 524.

Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, Board of Regents v. Roth, 408 U.S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. Perry v. Sindermann, 408 U.S. 593 (1972).

That question of whether speech of a Government employee is constitutionally protected expression necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). There is no suggestion by the Board that Doyle violated any established policy, or that its reaction to his communication to the radio station was anything more than an ad hoc response to Doyle's action in making the memorandum

public. We therefore accept the District Court's finding that the communication was protected by the First and Fourteenth Amendments. We are not, however, entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay.

. . . .

Clearly the Board legally could have dismissed respondent had the radio station incident never come to its attention. . . We are thus brought to the issue whether, even if that were the case, the fact that the protected conduct played a "substantial part" in the actual decision not to renew would necessarily amount to a constitutional violation justifying remedial action. We think that it would not.

A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunciated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

This is especially true where, as the District Court observed was the case here, the current decision to rehire will accord "tenure." The long-term consequences of an award of tenure are of great moment both to the employee and to the employer. They are too significant for us to hold that the Board in this case would be precluded, because it considered constitutionally protected conduct in deciding not to rehire Doyle, from attempting to prove to a trier of fact that quite apart from such conduct Doyle's record was such that he would not have been rehired in any event.

. . . .

Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"--or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had

shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

The judgment of the Court of Appeals is therefore vacated, and the case remanded for further proceedings consistent with this opinion.

So ordered.

The key to Mt. Healthy, and its significance in areas other than first amendment, is the Court's unwillingness to put an employee in a better position after the speech than the employee would have been in otherwise. Engaging in free speech should not immunize an employee from otherwise proper disciplinary action.

Congress, in the Whistleblower Protection Act of 1989, modified the Mt. Healthy standard in cases where the employee's speech constitutes whistleblowing under 5 U.S.C. § 2302(b)(8). In a whistleblowing case, initially the employee need only demonstrate that reprisal for whistleblowing was a contributing factor in the decision to take adverse action against the employee. If the employee satisfies this initial burden, then the agency must demonstrate by clear and convincing evidence that it still would have taken the same action. See 5 U.S.C. § 1214(b)(4). See also Horton v. Dep't of Transp., 66 F.3d 279 (Fed. Cir. 1995); Watson v. Dep't of Justice, 64 F.3d 1524 (Fed. Cir. 1995); Clark v. Dep't of Army, 997 F.2d 1466 (Fed. Cir., 1993), cert. denied, 114 S. Ct. 920 (1994); Kochanoff v. Dep't of Treasury, 54 M.S.P.R. 517 (1992); McDaid v. Department of Housing and Urban Development, 46 M.S.P.R. 416 (1990).

In the Civil Rights Act of 1991, Congress again modified the Court's mixed motive burdens from Mt. Healthy for cases arising under Title VII of the Civil Rights Act of 1964 and the other discrimination laws. In these cases, an employee must first demonstrate (satisfy the burden of production and persuasion) that discrimination was a "motivating factor" in the action. The employee can then receive attorney fees, costs, and injunctive relief, even if the employer can demonstrate it would have taken the same action without discrimination. Should the employer fail to satisfy its burden, it becomes liable for the full range of damages discussed in chapter 9, below. 42 U.S.C. § 2000e-5(g).

c. Fourth Amendment. Searches and seizures by Government employers or supervisors of private property of their employees are subject to restraints of the Fourth Amendment. O'Connor v. Ortega, 480 U.S. 709 (1987). In O'Connor, the Supreme Court ruled that a public employer's intrusion on an employee's constitutionally protected privacy interest is valid when justified at its inception by a work-related need or reasonable suspicion, and when it is reasonable in scope. See also Schowengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987); McGregor v. Greer, 748 F. Supp. 881 (D.D.C. 1990).

Compulsory drug testing by urinalysis of certain civilian employees mandated by Executive Order 12564 (September 15, 1987) also implicates the fourth amendment. The Supreme Court has held, however, that the need to detect and deter drug use by public employees performing certain law enforcement and safety-sensitive functions warrants warrantless--even suspicionless--drug testing. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). Applying Von Raab and Skinner, lower courts have upheld random testing of Army civilian employees occupying aviation, law enforcement, nuclear and chemical surety, and alcohol and drug control positions. NFFE v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 864 (1990); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989). See also Mulholland v. Department of the Army, 660 F. Supp. 1565 (E.D. Va. 1987) (aviation mechanics).

CHAPTER 5

EMPLOYEE PERFORMANCE

5.1 Employee Performance Appraisal System.

a. General.

One of the major changes made by the 1978 Civil Service Reform Act was the introduction of a separate statutory basis for removing employees based on unsatisfactory performance. The foundation of such an action is failure to satisfy performance standards. Until recently, OPM required all federal agencies to adopt a formal performance appraisal system with certain characteristics. It has recently withdrawn this requirement, however, and delegated to federal agencies authority to establish their own performance appraisal systems. Portions of the current OPM regulation are reproduced below.

b. Statutory Provisions.

Under the Civil Service Reform Act of 1978, all Federal agencies are required to adopt a performance appraisal system. The requirements for each agency's plan are set out in the statute and are reproduced below.

5 U.S.C. Chapter 43 -- Performance Appraisal.

§ 4301. Definitions.

For the purpose of this subchapter--

(1) "agency" means--

(A) an Executive agency;

(B) the Administrative Office of the United States Courts; and

(C) the Government Printing Office;

but does not include--

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) The General Accounting Office;

(2) "employee" means an individual employed in or under an agency, but does not include--

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under Chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service;

(F) an individual appointed by the President; or

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

§ 4302. Establishment of performance appraisal systems.

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

c. Regulatory Provisions.

(1) OPM Regulations. Regulations published by the Office of Personnel Management implement the statutory requirement of Title 5, Chapter 43. The new OPM regulations, found at 60 Fed. Reg. 43936 (Aug. 22, 1995), provide general guidance to agencies while delegating complete authority over performance appraisals to the agency. These new regulations allow agencies to establish a two-level, or pass-fail, system of performance appraisal.

5 C.F.R. § 430.203. Definitions.

In this subpart, terms are defined as follows:

Additional performance element means a dimension or aspect of individual, team, or organizational performance that is not a critical or non-critical element. Such elements are not used in assigning a summary level but, like critical and non-critical elements, are useful for purposes such as communicating performance expectations and serving as the basis for granting awards. Such elements may include, but are not limited to, objectives, goals, program plans, work plans, and other means of expressing expected performance. Appraisal means the process under which performance is reviewed and evaluated.

Appraisal period means the established period of time for which performance will be reviewed and a rating of record will be prepared. Appraisal program means the specific procedures and requirements established under the policies and parameters of an agency appraisal system. Appraisal system means a framework of policies and parameters established by an agency as defined at 5 U.S.C. 4301(1) for the administration of performance appraisal programs under subchapter I of chapter 43 of title 5, United States Code, and this subpart.

Critical element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.

Non-critical element means a dimension or aspect of individual, team, or organizational performance, exclusive of a critical element, that is used in assigning a summary level. Such elements may include, but are not limited to, objectives, goals, program plans, work plans, and other means of expressing expected performance.

Performance means accomplishment of work assignments or responsibilities.

Performance appraisal system: See Appraisal system.

Performance plan means all of the written, or otherwise recorded, performance elements that set forth expected performance. A plan must include all critical and non-critical elements and their performance standards.

Performance rating means the written, or otherwise recorded, appraisal of performance compared to the performance standard(s) for each critical and non-critical element on which there has been an opportunity to perform for the minimum period. A performance rating may include the assignment of a summary level (as specified in § 430.208(d)).

Performance standard means the management-approved expression of the performance threshold(s), requirement(s), or expectation(s) that must be met to be appraised at a particular level of performance. A performance standard may include, but is not limited to, quality, quantity, timeliness, and manner of performance.

Progress review means communicating with the employee about performance compared to the performance standards of critical and non-critical elements. Rating of record means the performance rating prepared at the end of an appraisal period for performance over the entire period and the assignment of a summary level (as specified in ' 430.208(d)). This constitutes the official rating of record referenced in this chapter.

5 C.F.R. § 430.204. Agency performance appraisal system(s).

(a) Each agency as defined at section 4301(1) of title 5, United States Code, shall develop one or more performance appraisal systems for employees covered by this subpart.

(b) An agency appraisal system shall establish agencywide policies and parameters for the application and operation of performance appraisal within the agency for the employees covered by the system. At a minimum, a agency system shall --

(1) Provide for --

(i) Establishing employee performance plans, including, but not limited to, critical elements and performance standards;

(ii) Communicating performance plans to employees at the beginning of an appraisal period;

(iii) Evaluating each employee during the appraisal period on the employee's elements and standards;

(iv) Recognizing and rewarding employees whose performance so warrants;

(v) Assisting employees in improving unacceptable performance; and

(vi) Reassigning, reducing in grade, or removing employees who continue to have unacceptable performance, but only after an opportunity to demonstrate acceptable performance.

(2) Identify employees covered by the system;

(3) Specify the flexibilities an agency program established under the system has for setting--

(i) The length of the appraisal period (as specified in § 430.206(a));

(ii) The length of the minimum period (as specified in § 430.207(a));

(iii) The number(s) of performance levels at which critical and non-critical elements may be appraised (as specified in § 430.206(b)(7) (i)(A) and (ii)(A)); and

(iv) The pattern of summary levels that may be assigned in a rating of record (as specified in § 420.208(d));

(4) Include, where applicable, criteria and procedures for establishing separate appraisal programs under an appraisal system; and

(5) Require that an appraisal program shall conform to statute, the regulations of this chapter, and the requirements established by the appraisal system.

(c) Agencies are encouraged to involve employees in developing and implementing their system(s). When agencies involve employees, the method of involvement shall be in accordance with the law.

§ 430.205 Agency performance appraisal program(s).

(a) Each agency shall establish at least one appraisal program of specific procedures and requirements to be implemented in accordance with the applicable agency appraisal system. At a minimum, each appraisal program shall specify the employees covered by the program and include the procedures and requirements for planning performance (as specified in § 430.206), monitoring performance (as specified in § 430.207), and rating performance (as specified in § 430.208).
(b) An agency program shall establish criteria and procedures to address employee performance for employees who are on detail, who are transferred, and for other special circumstances as established by the agency.
(c) An agency may permit the development of separate appraisal programs under an appraisal system.
(D) Agencies are encouraged to involve employees in developing and implementing their program(s). When agencies involve employees, the method of involvement shall be in accordance with law.

§ 430.206 Planning performance.

(a) Appraisal period.
(1) An appraisal program shall designate an official appraisal period for which a performance plan shall be prepared, during which performance shall be monitored, and for which a rating of record shall be prepared.
(2) The appraisal period shall generally be designated so that employees shall be provided a rating of record on an annual basis. An appraisal program may provide that longer appraisal periods may be designated when work assignments and responsibilities so warrant or performance management objectives can be achieved more effectively.
(b) Performance plan.
(1) Agencies shall encourage employee participation in establishing performance plans.
(2) Performance plans shall be provided to employees at the beginning of each appraisal period (normally within 30 days).
(3) An appraisal program shall require that each employee be covered by an appropriate written, or otherwise recorded, performance plan based on work assignments and responsibilities.
(4) Each performance plan shall include all elements which are used in deriving and assigning a summary level, including --
(i) At least one critical element that addresses individual performance; and

(ii) Any non-critical element(s).

(5) Each performance plan may include one or more additional performance elements, which --

(i) Are not used in deriving and assigning a summary level, and (ii) Are used to support performance management processes as described at § 430.102(b).

(6) An appraisal program shall establish how many and which performance levels may be used to appraise critical and non-critical elements.

(7) Elements and standards shall be established as follows --

(i) For a critical element --

(a) At least two levels for appraisal shall be used with one level being "Fully Successful" or its equivalent and another level being "Unacceptable," and

(b) A performance standard shall be established at the "Fully Successful" level and may be established at other levels.

(ii) For non-critical elements, when established, --

(a) At least two levels for appraisal shall be used, and

(b) A performance standard(s) shall be established at whatever level(s) is appropriate.

(iii) The absence of an established performance standard at a level specified in the program shall not preclude a determination that performance is at that level.

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(2) The new OPM regulations still require agencies to submit performance appraisal systems for approval, since that is required by law. This will obviously be a cursory review, at best. Agencies must keep their current performance appraisal system in place until OPM approves the new system.

(3) Army Implementation. The new Army implementation of these OPM regulations is located at AR 690-400, Chapter 4302, Total Army Performance Evaluation System (TAPES)(22 May 1993).

Note. All agency performance plans must be approved by OPM, and part of the agency's burden of proof in an employee appeal is OPM approval of its performance appraisal system. Griffin v. Department of Army, 23 M.S.P.R. 657 (1984). The MSPB has held that OPM approval can be proved by submitting agency regulations that reference OPM approval. Chennault v. Department of Army, 796 F.2d 465 (Fed. Cir. 1986). Appendix C-1 of AR 690-400, Chapter 4302, contains a copy of the OPM approval letter on the new TAPES.

5.2 Actions for Unacceptable Performance.

a. General. Title 5 U.S.C., Section 4303, provides the statutory authority for actions based on unacceptable performance. These performance-based actions require, as stated above, an appropriate appraisal system under 5 U.S.C. § 4302. An agency may also, in certain circumstances, take action against an employee for unacceptable performance under the

misconduct provisions of 5 U.S.C. Chapter 75 (see Chapter 5, Section I). Lovshin v. Department of Navy, 767 F.2d 826 (Fed. Cir. 1985), cert. denied, 475 U.S. 1111 (1986); Stenmark v. Dep't of Transp., 59 M.S.P.R. 462 (1993); McGillivray v. Federal Emergency Management Agency, 58 M.S.P.R. 398 (1993).

b. Statutory Requirements. The statute provides substantial procedural due process to employees who will be reduced in grade or removed for unacceptable performance. The procedures include both predecisional notice and opportunity to respond and postdecisional appeal rights, as follows:

§ 4303. Actions based on unacceptable performance.

(a) Subject to the provisions of this section, an agency may reduce in grade or remove an employee for unacceptable performance.

(b) (1) An employee whose reduction in grade or removal is proposed under this section is entitled to--

(A) 30 days' advance written notice of the proposed action which identifies--

(i) specific instances of unacceptable performance by the employee on which the proposed action is based; and

(ii) the critical elements of the employee's position involved in each instance of unacceptable performance;

(B) be represented by an attorney or other representative;

(C) a reasonable time to answer orally and in writing; and

(D) a written decision which--

(i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based, and

(ii) unless proposed by the head of the agency, has been concurred in by an employee who is in a higher position than the employee who proposed the action.

(2) An agency may, under regulations prescribed by the head of such agency, extend the notice period under subsection (b)(1)(A) of this section for not more than 30 days. An agency may extend the notice period for more than 30 days only in accordance with regulations issued by the Office of Personnel Management.

(c) The decision to retain, reduce in grade, or remove an employee--

(1) shall be made within 30 days after the date of expiration of the notice period, and

(2) in the case of a reduction in grade or removal, may be based only on those instances of unacceptable performance by the employee--

(A) which occurred during the 1-year period ending on the date of the notice under subsection (b)(1)(A) of this section in connection with the decision; and

(B) for which the notice and other requirements of this section are complied with.

(d) If, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided under subsection (b)(1)(A) of this section, any entry or other notation of the unacceptable performance for which the action was proposed under this section shall be removed from any agency record relating to the employee.

(e) Any employee who is--

(1) a preference eligible;

(2) in the competitive service; or

(3) in the excepted service and covered by subchapter II of Chapter 75, and who has been reduced in grade or removed under this section is entitled to appeal the action to the Merit Systems Protection Board under Section 7701.

(f) This section does not apply to--

(1) the reduction to the grade previously held of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title,

(2) the reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment or who has not completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less, or

(3) the reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions.

Note. The Civil Service Due Process Amendments of 1990 amended 5 U.S.C. § 4303(e) effective August 17, 1990. Subsection (e)(3) grants appeal rights for performance based actions to most nonpreference eligible excepted service employees who have completed 2 years of current continuous service in the same or similar positions.

c. Regulatory Requirements.

(1) OPM Regulations. Performance based actions are commonly referred to in the "trade" as "432 actions." This acronym derives from 5 C.F.R. Part 432, the OPM implementing regulations for performance based actions. The C.F.R. provisions are reproduced in part below.

5 C.F.R. Part 432--Performance Based Reduction in Grade and Removal Actions

§ 432.101. Statutory authority.

This part applies to reduction in grade and removal of employees covered by the Performance Management and Recognition System (PMRS) based solely on performance below the fully successful level and the reduction in grade and removal of other employees covered by the provisions of this part based solely on performance at the unacceptable level. 5 U.S.C. 4305 authorizes the Office of Personnel Management to prescribe regulations to carry out the purposes of title 5, Chapter 43, including 5 U.S.C. § 4303, which covers agency actions to reduce in grade or remove employees for unacceptable performance and 5 U.S.C. § 4302a(b) which covers actions to reduce in grade or remove employees covered by the Performance Management and Recognition Systems for performance below the fully successful level. (The provisions of 5 U.S.C. § 7501 et. seq., may also be used to reduce in grade or remove employees. See part 752 of this chapter.)

§ 432.102. Coverage.

(a) Actions covered. This part covers reduction in grade and removal of:

(1) Employees, covered by the PMRS, based on performance below the fully successful level; and

(2) Employees, not covered by the PMRS, based on unacceptable performance.

(b) Actions excluded. This part does not apply to:

(1) The reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. § 3321(a)(2) if such a reduction is based on supervisory or managerial performance and the reduction is to the grade held immediately before becoming a supervisor or manager in accordance with 5 U.S.C. § 3321(b);

(2) The reduction in grade or removal of an employee in the competitive service who is serving a probationary or trial period under an initial appointment;

(3) The reduction in grade or removal of an employee in the competitive service serving in an appointment that requires no probationary or trial period who has not completed 1 year of current continuous employment in the same or similar position under other than a temporary appointment limited to 1 year or less;

(4) The reduction in grade or removal of an employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions;

(5) An action imposed by the Merit Systems Protection Board under the authority of 5 U.S.C. 1206;

(6) An action taken under 5 U.S.C. § 7521 against an administrative law judge;

(7) An action taken under 5 U.S.C. § 7532 in the interest of national security;

(8) An action taken under a provision of statute, other than one codified in title 5 of the U.S. Code, which excepts the action from the provisions of title 5 of the U.S. Code;

(9) A removal from the Senior Executive Service to a civil service position outside the Senior Executive Service under Part 359 of this chapter;

(10) A reduction-in-force governed by Part 351 of this chapter;

(11) A voluntary action by the employee;

(12) A performance-based action taken under Part 752 of this chapter;

(13) An action that terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay if the agency informed the employee that it was to be of limited duration;

(14) A termination in accordance with terms specified as conditions of employment at the time the appointment was made; and

(15) An involuntary retirement because of disability under Part 831 of this chapter.

(c) Agencies covered. This part applies to:

(1) The executive departments listed at 5 U.S.C. § 101;

(2) The military departments listed at 5 U.S.C. § 102;

(3) Independent establishments in the executive branch as described at 5 U.S.C. § 104, except for a Government corporation;

(4) The Administrative Office of the U.S. Courts; and

(5) The Government Printing Office.

(d) Agencies excluded. This part does not apply to:

(1) A Government corporation;

(2) The Central Intelligence Agency;

(3) The Defense Intelligence Agency;

(4) The National Security Agency;

(5) Any executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities;

(6) The General Accounting Office;

(7) The U.S. Postal Service; and

(8) The Postal Rate Commission.

(e) Employees covered. This part applies to individuals employed in or under a covered agency as specified at § 432.102(c) except as listed in ' 432.102(f).

(f) Employees excluded. This part does not apply to:

(1) An employee in the competitive service who is serving a probationary or trial period under an initial appointment;

(2) An employee in the competitive service serving in an appointment that requires no probationary or trial period, who has not completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;

(3) An employee in the excepted service who has not completed 1 year of current continuous employment in the same or similar positions;

(4) An employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(5) An individual in the Foreign Service of the United States;

(6) A physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Department of Veterans Affairs, whose pay is fixed under Chapter 73 of title 38, U.S. Code, except persons appointed under 38 U.S.C. 4104(3);

(7) An administrative law judge appointed under 5 U.S.C. §3105;

(8) An individual in the Senior Executive Service;

(9) An individual appointed by the President;

(10) An employee occupying a position in Schedule C as authorized under Part 213 of this chapter;

(11) A reemployed annuitant;

(12) A National Guard technician;

(13) An individual occupying a position in the excepted service for which employment is not reasonably expected to exceed 120 calendar days in a consecutive 12 month period;

(14) An individual occupying a position filled by Noncareer Executive Assignment under Part 305 of this chapter; and

(15) A manager or supervisor returned to his or her previously held grade pursuant to 5 U.S.C. §§ 3321(a)(2) and (b).

§ 432.103. Definitions.

For the purpose of this part--

(a) "Acceptable performance" means performance that meets an employee's performance requirement(s) or standard(s) at a level of performance above "unacceptable" in the critical element(s) at issue where the employee is not covered by the Performance Management and Recognition System (PMRS). For those employees covered by the PMRS, acceptable performance is performance determined to be at the fully successful level or above in the critical element(s) at issue.

(b) "Critical element" means a component of a position consisting of one or more duties and responsibilities that contributes toward accomplishing organizational goals and objectives and that is of such importance that unacceptable performance on the element would result in unacceptable performance in the position.

(c) "Current continuous employment" means a period of employment or service immediately preceding an action under this part in the same or similar positions without a break in Federal civilian employment of a workday.

(d) "Opportunity to demonstrate acceptable performance" means a reasonable chance for the employee whose performance has been determined to be unacceptable in one or more critical elements to demonstrate acceptable performance in the critical element(s) at issue.

(e) "Performance improvement plan" means the plan agencies are required to provide to a PMRS employee whose performance in one or more critical elements

has been determined to be below the fully successful level. As part of the plan, agencies shall notify the employee of the critical element(s) in which he or she is performing below the fully successful level; describe the types of improvements that the employee must demonstrate to attain fully successful performance in his or her position; offer assistance to the employee in attaining fully successful performance; and provide the employee with a reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate fully successful performance. The agency may include, as part of the performance improvement plan, other information and matters that the agency considers appropriate.

(f) "Reduction in grade" means the involuntary assignment of an employee to a position at a lower classification or job grading level.

(g) "Removal" means the involuntary separation of an employee from employment with an agency.

(h) "Similar positions" mean positions in which the duties performed are similar in nature and character and require substantially the same or similar qualifications, so that the incumbents could be interchanged without significant training or undue interruption to the work.

(i) "Unacceptable performance" means performance of an employee that fails to meet established performance standards in one or more critical elements of such employee's position.

§ 432.104. Addressing unacceptable performance by non-PMRS employees.

At any time during the performance appraisal cycle that a non-PMRS employee's performance is determined to be unacceptable in one or more critical elements, the agency shall notify the employee of the critical element(s) for which performance is unacceptable and inform the employee of the performance requirement(s) or standard(s) that must be attained in order to demonstrate acceptable performance in his or her position. The agency may also inform the employee that unless his or her performance in the critical element(s) improves to and is sustained at an acceptable level, the employee may be reduced in grade or removed. For each critical element in which the employee's performance is unacceptable, the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance, commensurate with the duties and responsibilities of the employee's position. As part of the employee's opportunity to demonstrate acceptable performance, the agency shall offer assistance to the employee in improving unacceptable performance.

§ 432.105. Addressing below fully successful performance by non-PMRS employees.

At any time during the performance appraisal cycle that a PMRS employee's performance is determined to be below fully successful in one or more critical elements, the agency shall afford the employee an opportunity to improve through a

performance improvement plan. As part of the plan, the agency shall notify the employee of the critical element(s) in which he or she is performing below the fully successful level; describe the types of improvements that the employee must demonstrate to attain fully successful performance in his or her position; offer assistance to the employee in attaining fully successful performance; and provide the employee with a reasonable period of time, commensurate with the duties and responsibilities of the employee's position, to demonstrate fully successful performance. The agency may include, as part of the performance improvement plan, other information and matters that the agency considers appropriate. The agency may also inform the employee that, unless his or her performance in the critical element(s) improves to and is sustained at a fully successful level, the employee may be reduced in grade or removed.

§ 432.106. Proposing and taking action based on unacceptable performance for non-PMRS employees.

(a) Proposing action based on unacceptable performance.

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance pursuant to ' 432.104, an agency may propose a reduction-in-grade or removal action if the employee's performance during or following the opportunity to demonstrate acceptable performance is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

(2) If an employee has performed acceptably for 1 year from the beginning of an opportunity to demonstrate acceptable performance (in the critical element(s) for which the employee was afforded an opportunity to demonstrate acceptable performance), and the employee's performance again becomes unacceptable, the agency shall afford the employee an additional opportunity to demonstrate acceptable performance before determining whether to propose a reduction in grade or removal under this part.

(3) A proposed action may be based on instances of unacceptable performance which occur within a 1 year period ending on the date of the notice of proposed action.

(4) An employee whose reduction in grade or removal is proposed under this part is entitled to:

(i) Advance notice.

(A) The agency shall afford the employee a 30 day advance notice of the proposed action that identifies both the specific instances of unacceptable performance by the employee on which the proposed action is based and the critical element(s) of the employee's position involved in each instance of unacceptable performance.

(B) An agency may extend this advance notice period for a period not to exceed 30 days under regulations prescribed by the head of the agency. An agency may extend this notice period further without prior OPM approval for the following reasons:

(1) To obtain and/or evaluate medical; information when the employee has raised a medical issue in the answer to a proposed reduction in grade or removal;

(2) To arrange for the employee's travel to make an oral reply to an appropriate agency official, or the travel of an agency official to hear the employee's oral reply;

(3) To consider the employee's answer if an extension to the period for an answer has been granted (e.g., because of the employee's illness or incapacitation);

(4) To consider reasonable accommodation of a handicapping condition;

(5) If agency procedures so require, to consider positions to which the employee might be reassigned or reduced in grade; or

(6) To comply with a stay ordered by a member of the Merit Systems Protection Board under 5 U.S.C. § 1208(b).

(C) If an agency believes that an extension of the advance notice period is necessary for another reason, it may request prior approval for such extension from the Chief, Employee Relations Division, Office of Employee Labor Relations, Personnel Systems and Oversight Group, Office of Personnel Management, 1900 E Street, N.W., Washington, DC 20415.

(ii) Opportunity to answer. The agency shall afford the employee a reasonable time to answer the agency's notice of proposed action orally and in writing.

(iii) Representation. The agency shall allow the employee to be represented by an attorney or other representative. An agency may disallow as an employee's representative an individual whose activities as a representative would cause a conflict of interest or position or an employee whose release from his or her official position would give rise to unreasonable costs to the Government or whose priority work assignment precludes his or her release from official duties.

(iv) Consideration of medical conditions. The agency shall allow an employee who wishes to raise a medical condition which may have contributed to his or her unacceptable performance to furnish medical documentation (as defined in § 339.102 of this chapter of the condition for the agency's consideration. Whenever possible, the employee shall supply this documentation following the agency's notification of unacceptable performance under § 432.104. If the employee offers such documentation after the agency has proposed a reduction in grade or removal, he or she shall supply this information in accordance with § 432.105(a)(4)(ii). In considering documentation submitted in connection with the employee's claim of a medical condition, the agency may require or offer a medical examination in accordance with the criteria and procedures of Part 339 of this chapter, and shall be aware of the affirmative obligations of 39 C.F.R. 1613.704. If the employee who raises a medical condition has the requisite years of service under the Civil Service Retirement System or the Federal Employees Retirement System, the agency shall provide information concerning application for disability retirement. As provided at

§ 831.501(d) of this chapter, an employee's application for disability retirement shall not preclude or delay any other appropriate agency decision or personnel action.

(b) Final written decision. The agency shall make its final decision within 30 days after expiration of the advance notice period. Unless proposed by the head of the agency, such written decision shall be concurred in by an employee who is in a higher position than the person who proposed the action. In arriving at its decision, the agency shall consider any answer of the employee and/or his or her representative furnished in response to the agency's proposal. A decision to reduce in grade or remove an employee for unacceptable performance may be based only on those instances of unacceptable performance that occurred during the 1 year period ending on the date of issuance of the advance notice of proposed action under ' 432.105(a)(4)(i). The agency shall issue written notice of its decision to the employee at or before the time the action will be effective. Such notice shall specify the instances of unacceptable performance by the employee on which the action is based and shall inform the employee of any applicable appeal and/or grievance rights.

§ 432.108. Appeal and grievance rights.

(a) Appeal rights. An employee covered under § 432.102(e) who has been removed or reduced in grade under this part may appeal to the Merit Systems Protection Board if the employee is:

(1) In the competitive service and has completed a probationary or trial period;

(2) In the competitive service serving in an appointment which is not subject to a probationary or trial period, and has completed 1 year of current continuous employment in the same or similar position under other than a temporary appointment limited to 1 year or less;

(3) A preference eligible in the excepted service who has completed 1 year of current continuous employment in the same or similar position(s); or

(4) A nonpreference eligible in the excepted service who is covered by subparts C and D of part 752 of this chapter.

(b) Grievance rights. (1) A bargaining unit employee covered under § 432.102(e) who has been removed or reduced in grade under this part may file a grievance under an applicable negotiated grievance procedure if the removal or reduction in grade action falls within its coverage (e.g., is not excluded by the parties to the collective bargaining agreement) and the employee is:

(i) In the competitive service and has completed a probationary or trial period.

(ii) In the competitive service serving in an appointment which is not subject to a probationary or trial period, and has completed 1 year of current continuous employment in the same or similar position under other than a temporary appointment limited to 1 year or less; or

(iii) A preference eligible in the excepted service who has completed 1 year of current continuous employment in the same or similar position(s).

(2) 5 U.S.C. §§ 7114(a)(5) and 7121(b)(3), and the terms of an applicable collective bargaining agreement govern representation for employees in an exclusive bargaining unit who grieve a matter under this section through the negotiated grievance process.

(c) Election of forum. As provided at 5 U.S.C. § 7121(e)(1), a bargaining unit employee who by law may file an appeal or a grievance, and who has exercised his or her option to appeal an action taken under this part to the Merit Systems Protection Board, may not also file a grievance on the matter under a negotiated grievance procedure. Likewise, a bargaining unit employee who has exercised his or her option to grieve an action taken under this part may not also file an appeal on the matter with the Merit Systems Protection Board.

Note. 5 C.F.R. 432.108 (a)(4) provides appeal rights to most nonpreference eligible excepted service employees with 2 years of current continuous service under the Civil Service Due Process Amendments of 1990.

§ 432.109. Agency records.

(a) When the action is effected. The agency shall preserve all relevant documentation concerning a reduction in grade or removal which is based on unacceptable performance and make it available for review by the affected employee or his or her representative. At a minimum, the agency's records shall consist of a copy of the notice of proposed action, the answer of the employee when it is in writing, a summation thereof when the employee makes an oral reply, the written notice of decision and the reasons therefor, and any supporting material including documentation regarding the opportunity afforded the employee to demonstrate acceptable performance.

(b) When the action is not effected. As provided at 5 U.S.C. § 4303(d), if, because of performance improvement by the employee during the notice period, the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for 1 year from the date of the advance written notice provided in accordance with ' 432.105(a)(4)(i), any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from any agency record relating to the employee.

(2) Army Implementation. The Army implements these OPM regulations in AR 690-400, Chapter 4302.

d. Procedures for Performance-Based Actions. An employee who fails to meet established performance standards in one or more Responsibility or Objective (previously called "critical elements") may be reduced in grade or removed. The reduction or removal must be based on unacceptable performance occurring within one year of the date the employee is given notice of the action. 5 U.S.C. ' 4303(c)(2). This one-year period may, however, cover more than

one performance appraisal period. Weirauch v. Department of the Army, 782 F.2d 1560 (Fed. Cir. 1986); Sullivan v. Dep't of the Navy, 44 M.S.P.R. 646 (1990).

Before initiating a reduction or removal action, the agency must notify the employee of specific deficiencies in performance and allow the employee a reasonable time to demonstrate acceptable performance. During this performance improvement period ("PIP"), management must assist the employee to improve the unacceptable performance. If the employee improves performance during the PIP to an acceptable level, management takes no action. If, however, the employee's performance returns to an unacceptable level within one year after the beginning of the PIP (the so called "roller coaster" employee), management can initiate a removal or reduction action without giving the employee another PIP. Cohen v. General Services Admin., 53 M.S.P.R. 492 (1992); Cockrell v. Dep't of Air Force, 58 M.S.P.R. 211 (1993); Sullivan v. Department of the Navy, 44 M.S.P.R. 646 (1990). See 5 C.F.R. § 432.106(a)(1). Only after a full year has passed since the original notice of deficiencies need management provide a new PIP. 5 C.F.R. § 432.106(a)(2).

Employees demoted or removed for unacceptable performance frequently attempt to challenge the content of the performance standards by which they were rated. The agency must demonstrate that the performance standards are reasonable, realistic, and attainable. Johnson v. Department of Army, 44 M.S.P.R. 464 (1990). "Absolute" standards (standards requiring perfection or near perfection) are generally impermissible. Hurd v. Dep't of Interior, 53 M.S.P.R. 107 (1992); Walker v. Department of Treasury, 28 M.S.P.R. 227 (1985); Callaway v. Department of Army, 23 M.S.P.R. 592 (1984). Contra James v. Veterans Administration, 27 M.S.P.R. 124 (1985). Performance based actions may not be founded on "backwards" performance standards (defining unacceptable performance as minimally acceptable performance). Dancy v. Dep't of Navy, 55 M.S.P.R. 331 (1992) (holding backwards standards were effectively "fleshed out" by agency oral and written clarifications); Oritz v. Department of Justice, 46 M.S.P.R. 692 (1991). Standards must also be objective, "to the maximum extent feasible." 5 U.S.C. § 4302(b)(1). This means that performance standards must be sufficiently precise and specific to invoke a general consensus as to its meaning and content. Romero v. E.E.O.C., 55 M.S.P.R. 527 (1992).

An employee who fails to improve performance to an acceptable level during a PIP is entitled to 30 days' advance written notice of a proposed reduction in grade or removal. This notice must identify the specific incidents of unacceptable performance under the Responsibility or Objective that were failed during the PIP. An agency is not required to consider the employee's performance during this 30-day advance notice period in reaching its final decision on the proposed action. Gilbert v. Department of Health and Human Services, 27 M.S.P.R. 152 (1985). Like an employee facing a true adverse action based on misconduct, the employee subjected to a Chapter 43 action for unacceptable performance has the right to respond to the advance notice orally and in writing and to be represented by counsel. In a performance-based action, unlike in a misconduct action, the employee is entitled to a decision that has been concurred in by a supervisor above the proposing official. 5 U.S.C. § 4303(b)(1)(D)(ii).

If the employee appeals the reduction in grade or removal, the agency has the burden of demonstrating unacceptable performance by "substantial evidence" rather than the

"preponderance" standard applicable in misconduct cases. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3). Procedures in performance cases are subject to the harmful error rule. *See, e.g.* Diaz v. Dep't of Air Force, 63 F.3d 1107 (Fed. Cir. 1995) (finding that removal after expiration of proposal notice was subject to harmful error analysis). *But see* Stenmark v. Dep't of Transp., 59 M.S.P.R. 462 (1993); Nafus v. Dep't of Army, 57 M.S.P.R. 386 (1993); Cross v. Dep't of Air Force, 25 M.S.P.R. 353 (1984), regarding what is a "procedural" matter.

In a performance based case, the MSPB, arbitrators, and courts may not mitigate the agency's selected penalty (removal or demotion) as they can in misconduct cases. Lisiecki v. MSPB, 769 F.2d 1558 (Fed. Cir. 1985), cert. denied, 475 U.S. 1108 (1986); Horner v. Bell, 825 F.2d 391 (Fed. Cir. 1987); Davis v. Dep't of Health and Human Servs., 58 M.S.P.R. 538 (1993); Cook v. Equal Employment Opportunity Comm'n, 50 M.S.P.R. 660 (1991).

The procedures required for taking performance based actions also apply to employees in the excepted service. Appeal rights to the MSPB for excepted service employees are governed by 5 U.S.C. § 4303(e) and 5 U.S.C. § 7701. Section 7701(a) provides for appeal to the MSPB of any action "which is appealable to the Board under any law, rule, or regulation." To what extent may an agency, by its regulations, extend an appeal right for unacceptable performance actions to employees not given this right under § 4303(e)? The Court of Appeals for the Federal Circuit addressed this question in Schwartz v. Department of Transportation, 714 F.2d 1581 (Fed. Cir. 1983).

The petitioner in that case, Mr. Schwartz, was a nonpreference eligible in the excepted service (an attorney-advisor with DOT) until removed for unacceptable performance. Mr. Schwartz appealed to the MSPB, which held that it had no jurisdiction because of 5 U.S.C. § 4303. Mr. Schwartz appealed the MSPB's decision, arguing that the Department of Transportation could broaden Chapter 43 rights by regulation. He cited 5 U.S.C. § 7701(a) as the basis for his argument.

The court held that employees do not have appeal rights under Section 7701(a) simply because an agency has issued a regulation that purportedly bestows such a right. It must first be established that the agency issuing the regulation was specifically granted the authority to do so by statute. In this case, Schwartz failed to establish the requisite statutory authorization for the DOT's regulation on appeal rights.

The court read employing agencies' powers under Chapter 43 as being limited to the establishment of the performance appraisal systems, the encouragement of employee participation in the establishment of performance standards, and the use of the results of performance appraisal as a basis for training, rewarding, reassigning, promoting, reducing, retaining, and removing employees. In other words, the discretion given agencies under Chapter 43 is limited to the internal establishment and use of performance appraisal systems and does not extend to appellate jurisdiction from decisions taken under those systems.

As noted earlier, the Civil Service Due Process Amendments of 1990 extended MSPB appeal rights to most nonpreference eligible excepted service employees with 2 years current continuous service in the same or similar positions who are removed or demoted for unacceptable performance. Schwartz would, of course, continue to apply to nonpreference eligible excepted service employees not covered by the 1990 amendments.

Of course, nonpreference eligible excepted service employees who have completed the equivalent of a 1-year probationary period but who are not covered by the 1990 amendments may be able to challenge a performance based action through agency grievance procedures. See infra, Chapter 3.

CHAPTER 6

REDUCTIONS IN FORCE

6.1 Introduction.

A Federal agency may be required to lay off, reassign, transfer, or terminate some of its employees based on organizational changes, lack of funds, decreases in available work, or requirements to reinstate an employee with reemployment rights. The procedures used to establish retention priorities among employees are contained in the reduction-in-force regulations of the Office of Personnel Management.

Under this system of regulations, employees within a specified organizational or geographical region compete for retention on the basis of four factors specified by law in 5 U.S.C. § 3502: tenure of employment, veterans' preference, total length of civilian and creditable military service, and performance ratings. Employees are ranked on the basis of these factors, and then the employees are released or reassigned beginning with those persons having the lowest ranking. A reduction-in-force at one level can have a domino effect on numerous positions at lower levels in the same Federal agency. The statutory and regulatory requirements for this procedure are the subject of this chapter.

6.2 Statutory Requirements.

Congress has prescribed general criteria for Federal agencies to determine which employees to release during a reduction-in-force.

5 U.S.C. § 3502. Order of retention.

(a) The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to-

(1) tenure of employment;
(2) military preference, subject to section 3501(a)(3) of this title;
(3) length of service; and
(4) efficiency or performance ratings.

In computing length of service, a competing employee--

(A) who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(B) who is a retired member of a uniformed service is entitled to credit for--

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) of this title; and

(C) is entitled to credit for service rendered as an employee of a county committee established pursuant to section 590h(b) of title 16, or of a committee or an association of producers described in section 610(b) of title 7.

(b) A preference eligible described in section 2108(3)(c) of this title who has a compensable service-connected disability of 30 percent or more and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

(c) an employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this title is entitled to be retained in preference to other competing employees.

The general rule under this law is that veterans who qualify as "preference eligibles" with satisfactory performance ratings receive higher retention standing than nonveterans. Many retired veterans do not receive this veterans preference under 5 U.S.C. § 3501, which defines preference eligible employees for purposes of retention preferences. Retired military personnel who have 20 or more years of service are not considered preference eligibles under 5 U.S.C. § 3501(3)(B) unless their retired pay is based on disability. Likewise, under 5 U.S.C. § 3501(3)(A), a disabled veteran whose injury was not the result of service in war or armed conflict is not entitled to the preference for purposes of determining order of retention. An individual may therefore be considered a preference eligible for appointment and appeal rights but not for reductions-in-force.

6.3 Regulatory Requirements.

a. Scope of Competition. A Federal agency must follow the regulations in 5 C.F.R. Part 351 whenever it intends to release a competing employee under a reduction-in-force (RIF). An agency is never required to fill a vacant position during a RIF (5 C.F.R. 351.201(b)); however, if it elects to do so, it must follow the RIF rules for RIF. Both competitive service and excepted service employees can be subjected to a RIF. Excepted service employees are ranked separately from competitive service employees and then released in the same order as the competitive service employees, but from their own list.

(1). **Competitive Area.** Before an agency can determine which employees will be affected, it must establish the competitive area and the competitive level for the RIF. Once these are defined, the agency determines which employees will compete under the RIF and establishes its retention register. Those employees with the lowest rankings are released first.

The first step in the RIF process is to establish the competitive area.

5 C.F.R. § 351.402 Competitive Area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.
(b) A competitive area may consist of all or part of an agency. The minimum competitive area in the departmental service is a bureau, major command, directorate or other equivalent major subdivision of an agency within the local commuting area. In the field, the minimum competitive area is an activity under separate administration within the local commuting area. A competitive area must be defined solely in terms of an agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined.
(c) When a competitive area will be in effect less than 90 days prior to the effective date of a reduction in force, a description of the competitive area shall be submitted to the OPM for approval in advance of the reduction in force. Descriptions of all competitive areas must be made readily available for review.
(d) Each agency shall establish a separate competitive area for each Inspector General activity established under authority of the Inspector General Act of 1978, Public Law 95-452, as amended, in which only employees of that office shall compete for retention under this part.

The "commuting area" referred to in § 402 is defined in 5 C.F.R. 351.203 as "the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment." *See also* Ginnodo v. Office of Personnel Mgt., 753 F.2d 1061 (Fed. Cir.), *cert. denied*, 474 U.S. 848 (1985); Blevins v. Tennessee Valley Auth., 46 M.S.P.R. 239 (1990); Compton v. Dep't of Energy, 3 M.S.P.R. 452 (1980). Generally, the competitive area in the military departments is the local installation. The minimum competitive area is a bureau, major command, directorate, or other equivalent major subdivision of an agency within a local commuting area. "Just because a few employees may travel great distances and endure substantial commute times, the agency is not obligated to reflect these extremes in establishing competitive areas." Kelley v. Dept of Defense, 107 F.3d 30 (Fed.Cir. 1997)

(2). **Competitive Level.** Once the agency has defined the competitive area for the RIF, it then establishes competitive levels for the competitive areas affected. These "levels" divide employees into separate groups based on their classification series and grade,
type of appointment (competitive or excepted service) and appointment authority, pay schedule work schedule, supervisory status, and trainee status. The end result is many, many different groups, or levels, of employees.

5 C.F.R. § 351.403 Competitive Level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that the incumbent of one position could successfully

perform the critical elements of any other position upon entry into it, without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee. Sex may not be the basis for assigning a position to a competitive level, except for a position which OPM has determined certification of eligibles by sex is justified.

(b) Each agency shall establish separate competitive levels according to the following categories:

(1) By service. Separate levels shall be established for positions in the competitive service and in the excepted service.

(2) By appointment authority. Separate levels shall be established for excepted service positions filled under different appointment authorities.

(3) By pay schedule. Separate levels shall be established for positions under different pay schedules.

(4) By work schedule. Separate levels shall be established for positions filled on a full-time, part-time, intermittent, seasonal, or on-call basis. No distinction may be made among employees in the competitive level on the basis of the number of hours or weeks scheduled to be worked.

(5) By supervisory or nonsupervisory status. Separate levels shall be established for positions filled by a supervisor or management official as defined in 5 U.S.C. 7103(a)(10) and (11), except that a probationary period required by Subpart I of Part 315 of this chapter for initial appointment to a supervisory or managerial position is not a basis for establishing a separate competitive level.

(6) By trainee status. Separate levels shall be established for positions filled by an employee in a formally designated trainee or developmental program having all of the characteristics covered in s 351.702(e)(1) through (e)(4) of this part.

See Jicha v. Dep't of Navy, 65 M.S.P.R. 73 (1994); Griffin v. Dep't of Navy, 64 M.S.P.R. 561 (1994); Kline v. Tennessee Valley Authority, 46 M.S.P.R. 193 (1990); Foster v. U.S. Coast Guard, 8 M.S.P.R. 240 (1981).

(3). **Retention Register**. An agency that plans to release employees from a competitive level must first establish a retention register of all employees within the level. This retention register is a reverse rank-order list of employees who will be released from the competitive level in the RIF.

5 C.F.R. § 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees. Except for an employee on military duty with a restoration right, the agency shall enter on the retention register, in the order of retention standing, the name of each competing employee who is:

(1) In the competitive level;

(2) Temporarily promoted from the competitive level by temporary or term promotion; or

(3) Detailed from the competitive level under 5 U.S.C. § 3341 or other appropriate authority.

(b)(1) The name of each employee serving under a time limited appointment or promotion to a position in a competitive level shall be entered on a list apart from the retention register for that competitive level, along with the expiration date of the action.

(2) The agency shall list, at the bottom of the list prepared under paragraph (b)(1) of this section, the name of each employee in the competitive level with a written decision under Part 432 of this chapter to remove him or her because of unacceptable (Level 1) or equivalent performance.

b. Retention Standing. The agency determines the employee's retention standing, or where the employee's name is placed on the retention register, immediately upon establishing the scope of the RIF. This affected employees are grouped according to their tenure group and preference subgroup and then rank-ordered within the subgroups based on their length of service and performance ratings. Employees are then released in reverse sequence based on their retention standing. The OPM regulations describe how retention standing is calculated.

5 C.F.R. § 351.501 Order of retention--competitive service.

(a) Competing employees shall be classified on a retention register on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order as follows:

(1) By tenure group I, group II, group III; and

(2) Within each group by veteran preference subgroup AD, subgroup A, subgroup B; and

(3) Within each subgroup by years of service as augmented by credit for performance under § 351.504, beginning with the earliest service date.

(b) Groups are defined as follows:

(1) Group I includes each career employee who is not serving a probationary period. (a supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this title is in group I if the employee is otherwise eligible to be included in this group.)

(2) Group II includes each career-conditional employee and each employee serving a probationary period under Subpart H of Part 315 of this chapter. (A supervisory or managerial employee serving a probationary period required by Subpart I of Part 315 of this chapter is in group II if that employee has not completed a probationary period under Subpart H of Part 315 of this chapter).

(3) Group III includes all employees serving under indefinite appointments, temporary appointments pending establishment of register, status quo appointment, and any other nonstatus nontemporary appointment, as well as appointments which meet the definition of provisional appointments contained in §§ 316.401 and 316.403 of this chapter.

(c) Subgroups are defined as follows:

(1) Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30 percent or more.

(2) Subgroup A includes each preference eligible employee not included in subgroup AD.

(3) Subgroup B includes each nonpreference eligible employee.

(d) a retired member of a uniformed service is considered a preference eligible under this part only if the member meets at least one of the conditions of the following paragraphs (d)(1), (2), or (3) of this section, except as limited by paragraph (d)(4) or (d)(5):

(1) The employee's military retirement is based on disability that either:

(i) Resulted from injury or disease received in the line of duty as a direct result of armed conflict; or

(ii) Was caused by an instrumentality of war incurred in the line of duty during a period of war as defined by sections 101 and 301 of title 38, United States Code.

(2) The employee's retired pay from a uniformed service is not based upon 20 or more years of full-time active service, regardless of when performed but not including periods of active duty for training.

(3) The employee has been continuously employed in a position covered by this part since November 30, 1964, without a break in service of more than 30 days.

(4) An employee retired at the rank of major or above (or equivalent) is considered a preference eligible under this part if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code, and meets one of the conditions covered in paragraph (d)(1), (2), or (3) of this section.

(5) An employee who is eligible for retired pay under chapter 67 of title 10, United States Code, and who retired at the rank of major or above (or equivalent) is considered a preference eligible under this part at age 60, only if such employee is a disabled veteran as defined in section 2108(2) of title 5, United States Code.

The rules on retention of excepted service employees are substantially the same as those that apply to competitive service employees.

5 C.F.R. § 351.502 Order of retention--excepted service.

Competing employees in the excepted service shall be classified on retention registers in a way that corresponds to that under s 351.501 for employees in the competitive service having similar tenure of employment, veteran preference and performance ratings except that an employee who completes 1 year of current continuous excepted service under a temporary appointment is in tenure group III.

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(3). **Length of service.** An employee's standing on the retention register often determines whether the employee will stay employed in the agency or be released, or "RIFed," as the saying goes. The employee's standing is determined by the sum of the employee's length of service and constructive credit based on the employee's three most recent performance appraisals.

As the following regulations demonstrate, the key to an employee's standing is often the performance appraisals.

5 C.F.R. § 351.503 Length of service.

(a) Each agency shall establish a service date for each competing employee.
(b) An employee's service date is whichever of the following dates reflects the employee's creditable service:

(1) The date the employee entered on duty, when he or she has no previous creditable service;

(2) The date obtained by subtracting the employee's total creditable previous service from the date he or she last entered on duty; or

(3) The date obtained by subtracting from the date in paragraph (b)(1) or (b)(2) of this section, the service equivalent allowed for performance ratings under § 351.504.
(c) An employee who is a retired member of a uniformed service is entitled to credit under this part for:

(1) The length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) The total length of time in active service in the armed forces if the employee is considered a preference eligible under § 351.501(d) of this part.
(d) Each agency shall adjust the service date for each employee to withhold credit for noncreditable time.

5 C.F.R. § 351.504 Credit for performance.

(a) Annual performance ratings of record of outstanding (Level 5), exceeds fully successful (Level 4), fully successful (Level 3), minimally successful (Level 2), and unacceptable (Level 1), or equivalent, are those ratings established under part 430 of this chapter.
(b) (1) An employee's entitlement to additional service credit for performance under this subpart shall be based on the employee's three most recent annual performance ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices, except as provided in paragraph (b)(2) of this section.

(2) To provide adequate time to determine employee retention standing, an agency may provide for a cutoff date--a specified number of days prior to the issuance of reduction in force notices--after which no new annual ratings will be put on record and used for purposes of this subpart. When a cutoff date is used, an employee will receive performance credit for the three most recent annual ratings received during the 4-year period prior to the cutoff date.

(3) To be creditable for purposes of this subpart, a rating must have been issued to the employee, with all appropriate reviews and signatures, and must also be on record (e.g., the rating is available for use by the office responsible for establishing retention registers).

(4) The awarding of additional service credit based on performance for purposes of this subpart must be uniformly and consistently applied, and must be consistent with the agency's performance appraisal system, and other appropriate issuances that

implement these policies. Each agency must specify in its performance appraisal system or other appropriate issuance:

(i) The types of annual performance ratings of record that are used for purposes of this subpart;

(ii) The conditions under which a rating is considered to have been received for purposes of determining whether it is within the 4-year period prior to either the date the agency issues reduction in force notices or the agency- established cutoff date for ratings, as appropriate; and

(iii) If the agency elects to use a cutoff date, the number of days prior to the issuance of reduction in force notices after which no new annual ratings will be put on record and used for purposes of this subpart.

(c) Service credit for employees who do not have three actual annual performance ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices, or the 4-year period prior to the agency-established cutoff date for ratings permitted in paragraph (b)(2) of this section, shall be determined as follows:

(1) An employee who has not received an annual performance rating of record shall receive credit for performance on the basis of three assumed ratings of fully successful (Level 3) or equivalent.

(2) An employee who has received at least one but fewer than three previous annual performance ratings of record shall receive credit for performance on the basis of the actual rating(s) received and of one, or two assumed ratings(s) of fully successful (Level 3) or equivalent, whichever is needed to credit the employee with three ratings.

(d) The additional service credit an employee receives for performance under this subpart shall be expressed in additional years of service and shall consist of the mathematical average (rounded in the case of a fraction to the next higher whole number) of the employee's last three (actual and/or assumed) annual performance ratings of record computed on the following basis:

(1) Twenty additional years of service for each performance rating of outstanding (Level 5) or equivalent;

(2) Sixteen additional years of service for each performance rating of exceeds fully successful (Level 4) or equivalent; or

(3) Twelve additional years of service for each performance rating of fully successful (Level 3) or equivalent.

(e) The current annual performance rating of record shall be the last annual rating except that:

(1) An employee who has received an improved rating following an opportunity to demonstrate acceptable performance as provided in part 432 of this chapter shall have the improved rating considered as the current annual performance rating of record; and

(2) An employee's current annual performance rating of record shall be presumed to be fully successful when the employee had been demoted or reassigned under part 432 of this chapter because of unacceptable performance and as of the date of issuance of reduction in force notices has not received a rating for performance in the position to which demoted or reassigned.

Note: On February 4, 1997 OPM proposed regulations that enhance the opportunity for federal employees to receive retention service credit during reductions in force based on their actual job performance. The new regulations propose a greater use of actual performance through several mechanisms. First, a longer look back period of six years will be phased in. Second, fewer assumed ratings will be used because an average will be taken of actual ratings. Third, a new method will be used for determining the value of assumed ratings for employees with no ratings. In addition, since September of 1995, there has been eight possible performance rating patterns (*e.g.*, pass/fail, traditional five level, etc.). The new regulations propose that if ratings exist under more than one pattern in a competitive area, the agency can decide on credit within certain limits. (See 62 Federal Register 5174 (1997).)

(4) **Release from competitive level - RIF.** After the agency determines the standing of employees within their levels on the retention register, it is ready to begin its RIF. Starting with the employees with the lowest relative retention standing, the agency releases or reassigns employees and works its way up the register. With few exceptions, employees with a higher relative standing on the register will not be affected by the RIF until all employees of lower standing have been released or reassigned.

5 C.F.R. § 351.601 Order of release from competitive level.

(a) Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. An agency may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing except:

(1) As required under § 351.606 when an employee is retained under a mandatory exception or under § 351.806 when an employee is entitled to a new written notice of reduction in force; or

(2) As permitted under § 351.607 when an employee is retained under a permissive continuing exception or under § 351.608 when an employee is retained under a permissive temporary exception.

(B) When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

c. Assignment Rights. During a RIF, many employees may be reassigned into a different position rather than furloughed or separated. To be considered for reassignment, an employee must be qualified for the new position and must meet certain regulatory requirements. In certain instances, an agency must reassign an employee in lieu of taking other action, although an agency is never required to fill a vacant position with an employee displaced by a RIF. The following regulations describe the rights of various employees to "bump" and "retreat" in a RIF. As you read them, consider what happens to the Federal employees when an organization undergoes a major reorganization and a significant reduction in the number of civilian positions.

§ 351.701 Assignment involving displacement.

(a) General. When a group I or II competitive service employee with a current annual performance rating of record of minimally successful (Level 2) or equivalent, or higher, is released from a competitive level, an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c), and (d) of this section to another competitive position which requires no reduction or the least possible reduction in representative rate. The employee must be qualified for the offered position. The offered position shall be in the same competitive area and last at least 3 months. Upon accepting an offer of assignment, or displacing another employee under this part, an employee retains the same status and tenure in the new position. The promotion potential of the offered position is not a consideration in determining an employee's right of assignment.

(b) Lower subgroup--bumping. A released employee shall be assigned in accordance with paragraph (a) of this section and bump to a position that:

(1) Is held by another employee in a lower tenure group or in a lower subgroup within the same tenure group; and

(2) Is no more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released.

(c) Same subgroup--retreating. a released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and retreat to a position that:

(1) Is held by another employee with lower retention standing in the same tenure group and subgroup;

(2) Is not more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released, except that for a preference eligible employee with a compensable service-connected disability of 30 percent or more the limit is five grades (or appropriate grade intervals or equivalent); and

(3) Is the same position, or an essentially identical one, previously held by the released employee in a Federal agency.

(d) Limitation. An employee with a current annual performance rating of record of minimally successful (Level 2) or equivalent may be assigned under paragraph (c) of this section only to a position held by another employee with a current annual performance rating of record no higher than minimally successful (Level 2) or equivalent.

(e) Pay rates.

(1) The determination of equivalent grade intervals shall be based on a comparison of representative rates.

(2) Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific reduction-in-force notices, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.

§ 351.702 Qualifications for assignment.

(a) Except as provided in § 351.703, an employee is qualified for assignment under § 351.701 if the employee:

(1) Meets the OPM standards and requirements for the position, including any minimum educational requirement, and any selective placement factors established by the agency;

(2) Is physically qualified, with reasonable accommodation where appropriate, to perform the duties of the position;

(3) Meets any special qualifying condition which the OPM has approved for the position; and

(4) Clearly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical elements of the specific position upon entry into it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee.

(b) The sex of an employee may not be considered in determining whether an employee is qualified for a position, except for positions which OPM has determined certification of eligibles by sex is justified.

(c) An employee who is released from a competitive level during a leave of absence because of a compensable injury may not be denied an assignment right solely because the employee is not physically qualified for the duties of the position if the physical disqualification resulted from the compensable injury. Such an employee must be afforded appropriate assignment rights subject to recovery as provided by 5 U.S.C. 8151 and Part 353 of this chapter.

(d) If an agency determines, on the basis of evidence before it, that a preference eligible employee who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of a position to which the employee would otherwise have been assigned under this part, the agency must notify the OPM of this determination. At the same time, the agency must notify the employee of the reasons for the determination and of the right to respond, within 15 days of the notification, to the OPM which will require the agency to demonstrate that the notification was timely sent to the employee's last known address. The OPM shall make a final determination concerning the physical ability of the employee to perform the duties of the position. This determination must be made before the agency may select any other person for the position. When the OPM has completed its review of the proposed disqualification on the basis of physical disability, it must sent its finding to both the agency and the employee. The agency must comply with the findings of the OPM. The functions of the OPM under this paragraph may not be delegated to an agency.

(e) An agency may formally designate as a trainee or developmental position a position in a program with all of the following characteristics:

(1) The program must have been designed to meet the agency's needs and requirements for the development of skilled personnel;

(2) The program must have been formally designated, with its provisions made known to employees and supervisors;

(3) The program must be developmental by design, offering planned growth in duties and responsibilities, and providing advancement in recognized lines of career progression; and

(4) The program must be fully implemented, with the participants chosen through standard selection procedures. To be considered qualified for assignment under § 351.701 to a formally designated trainee or developmental position in a program having all of the characteristics covered in paragraphs (e)(1), (2), (3), and (4) of this section, an employee must meet all of the conditions required for selection and entry into the program.

6.4 A General Overview of the RIF Process.

a. Summary. The establishment of the retention register can best be understood by thinking of it as a repeated screening process. First, the employees are grouped according to the type of their appointment as follows:

Group I	Career employees (non-probationary)
Group II	Career employees serving probationary periods and Career-conditional employees
Group III	Indefinite employees and Term employees

Second, each of these groups is subdivided into three subgroups: AD for disabled veterans (30% variety), A for veterans, and B for nonveterans. Within each subgroup the employees are ranked according to their service dates reflecting their total Federal (civilian and military) service. Employees are given additional service credit based on their last three annual performance ratings, if outstanding (level 5), exceeds fully successful (level 4), or fully successful ratings (level 3) were given.

Three types of employees are listed apart from the retention register: (1) those with temporary appointments limited to one year or less, (2) those holding only temporary promotions to the affected positions, and (3) those with unsatisfactory performance ratings. These employees are not considered "competing employees" and must be released before anyone else on the retention register is released.

An employee in Group I or Group II (not Group III) who is released during a RIF is entitled to a reasonable offer of reassignment if the agency has a suitable job that the employee can assume by displacing another employee with a "bump" or "retreat." A job is suitable only if it is (1) located in the same competitive area, (2) at the same or a lower grade as that from which the competing employee was released, (3) one for which the employee is fully qualified, and (4) one that the employee can fill without unduly interrupting the agency's work. A "bump" occurs when the employee displaces an employee in a lower retention group or subgroup in a different competitive level. A "retreat" occurs when the employee returns to a job from which the employee was promoted (or one like it) and displaces an employee with a later service date in the same subgroup. The agency must only make one reasonable offer of reassignment; it need neither fill a particular vacant position nor offer a particular position because the employee would

prefer it. An employee who refuses a reasonable offer can be separated. The effect of these assignments is the creation of waves of RIF actions as the employees in each successive lower grade level go through the bumps and retreats in attempting to avoid separation.

b. Notice of RIF. Before an employee can be released from a competitive level, the employee is entitled to at least 60 days' advance written notice (a recent change to the previous requirement of 30 days). DOD employees receive 120 days notice if more than 50 employees are involved. 5 C.F.R. § 351.801(a)(2)(extends longer notice effective date through January 31, 2000). Previously agencies issued a general notice of the intended RIF action to all employees likely to be affected and then later issue a specific notice to the employees actually affected. This process is no longer allowed. The following rules of notice now apply:

§ 351.801 Notice period.

(a) Except as provided in paragraph (b) of this section, each competing employee selected for release from a competitive level under this part is entitled to a specific written notice at least 60 full days before the effective date of release. At the same time an agency issues a notice to an employee, it must notify the exclusive representative(s), as defined in 5 U.S.C. § 7103(a)(16), of each affected employee at the time of the notice.
(b) When a reduction in force is caused by circumstances not reasonably foreseeable, OPM, at the request of an agency head or designee, may authorize a notice period of less than 60 days but at least 30 full days before the effective date of release. An agency request to OPM shall specify:
(1) The reduction in force to which the request pertains;
(2) The number of days by which the agency requests that the period be shortened;
(3) The reasons for the request; and
(4) Any other additional information that OPM may specify in the Federal Personnel Manual.
(c) The notice period begins the day after the employee receives the notice.
(d) When an agency retains an employee under § 351.607 or § 351.608 of this part, the notice to the employee shall cite the date on which the retention period ends as the effective date of the employee's release from the competitive level.

§ 351.802 Content of notice.

The notice shall state specifically:

(a) The action to be taken and its effective date;
(b) The employee's competitive area, competitive level, subgroup, service date, and annual performance ratings of record received during the last 4 years as provided in § 351.504 of this part;
(c) The place where the employee may inspect the regulations and records pertinent to this case;

(d) The reasons for retaining a lower-standing employee in the same competitive level under §351.607 or § 351.608 of this part;
(e) Information on reemployment rights, except as permitted by paragraph 351.803(a) of this part; and
(f) The employee's right, as applicable, to grieve under a negotiated grievance procedure or to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations. The agency shall also comply with § 1201.21 of this title.

§ 351.803 Notice of eligibility for reemployment and other placement assistance.

(a) An employee who receives a specific notice of separation under this part must be given information concerning the right to reemployment consideration under subparts B (Reemployment Priority List) and C (Displaced Employee Program) of part 330 of this chapter. The employee also must be given information concerning how to apply for unemployment insurance through his or her appropriate State program. This information must be provided either in or with the specific reduction in force notice or as a separate supplemental notice to the employee.
(b) When 50 or more employees in a competitive area receive separation notices under this part, the agency must provide notification of the action, at the same time it issues specific notices of separation to employees, to:

(1) The State dislocated worker unit, as designated or created under title III of the Job Training Partnership Act;

(2) The chief elected official of local government(s) within which these separations will occur; and

(3) OPM.

(c) The notice required by paragraph (b) of this section must include:

(1) The number of employees to be separated from the agency by reduction in force (broken down by geographic area or other basis specified by OPM);

(2) The effective date of the separations; and

(3) Any other information specified in the Federal Personnel Manual, including information needs identified from consultation between OPM and the Department of Labor to facilitate delivery of placement and related services.

§ 351.804 Expiration of notice.

A notice expires except when followed by the action specified, or by an action less severe than specified, in the notice or in an amendment made to the notice before the agency takes the action. An agency may not take action before the effective date in the notice. An action taken after the specified date in the notice shall not be ruled invalid for that reason except when it is challenged by a higher-standing employee in the competitive level who is reached out of order for reduction in force as a result of the action.

§ 351.805 New notice required.

An employee is entitled to a new written notice of at least 60 full days if the agency decides to take an action more severe than first specified.

§ 351.806 Status during notice period.

When possible, the agency shall retain the employee on active duty during the notice period. When in an emergency the agency lacks work or funds or for all or part of the notice period, it may place the employee on annual leave with or without his or her consent, on leave without pay with his or her consent, or in a nonpay status without his or her consent.

As with an action for misconduct, if the agency decides to take an action more severe than that specified in the notice, the employee is entitled to a new written notice and an additional 30-day period before the more severe action can become effective. An employee normally remains in an active duty status during the notice period, although an agency can place an employee on annual leave, on leave without pay, or in a nonpay status in emergency situations (lack of work or lack of funds).

An employee who is reduced in pay or grade or removed in a reduction in force can appeal to the Merit Systems Protection Board unless the employee is covered by a negotiated grievance procedure (NGP). 5 C.F.R. § 351.901. Employees covered by an NGP must use that process unless it specifically excepts grievance of RIF. *See* Sotak v. HUD, 19 M.S.P.R. 569 (1984). An MSPB appeal must be in writing and must be initiated under the MSPB's regulations within 30 days of the action's effective date. 5 C.F.R. § 1201.22. The appeal is limited to the issue of whether the agency has correctly applied the RIF procedures. Examples of typical employee appeals include allegations that (1) the agency failed to make a reasonable offer of assignment; (2) the agency failed to grant the employee proper veteran's preference rights; (3) the retention register was improperly established; and (4) the RIF procedure was improperly used in lieu of some other required procedure. If the employee wins the appeal at the Merit Systems Protection Board, the agency will be bound by the decision and required to take corrective action, unless it petitions the MSPB to reopen and reconsider the case. 5 C.F.R. § 1201.113.

Note 1. In a RIF appeal, the burden of proof is on the agency to prove by a preponderance of the evidence that a reduction in force was invoked for one of the legitimate reasons set forth in 5 C.F.R. § 351.201(a). Once the agency has met this burden, the employee must provide rebuttal evidence to place into issue the agency's asserted reasons for the RIF action. Schroeder v. Dep't of Transp., 60 M.S.P.R. 566 (1994); Losure v. Interstate Commerce Commission, 2 M.S.P.R. 195 (1980).

Note 2. The determination of an employee's retention standing includes possible extra credit for performance of duty above the fully successful level. The agency is required to use the employee's current performance rating for this purpose. The current rating is the rating which is

on record on the day when the RIF notice is issued. A rating of "outstanding" that has not yet received agency approval (under agency performance appraisal regulation) at the time the RIF notice is issued cannot be considered. This underscores the importance of timely performance appraisals for civilian employees. 5 C.F.R. 351.504. AFGE v. OPM, 821 F.2d 761 (D.C. Cir. 1987); Haataja v. Department of Labor, 25 M.S.P.R. 594 (1985); Mazzola v. Department of Labor, 25 M.S.P.R. 682 (1985)

Note 3. Where procedural error is present in an agency reduction-in-force, the appellant must show harmful error in the agency's application of those procedures. There is no harmful error where the correct application of procedural rights in a RIF would not change the outcome. Jicha v. Dep't of Navy, 65 M.S.P.R. 73 (1994); Horne and Miller v. Interstate Commerce Commission, 5 M.S.P.R. 208 (1981). Where the agency error involves substantive rather than procedural rights of the affected employee, however, the Board will not have to consider the harmful error question. Only procedural rights are subject to the harmful error standard of 5 U.S.C. § 7701(c)(2)(A). Barney Ray v. Department of Air Force, 3 M.S.P.R. 445 (1980).

6.5 Improper Use of Reduction-in-Force Actions.

The following administrative decision by the Civil Service Commission illustrates what happens if an agency attempts to use the RIF procedures improperly in lieu of the adverse action procedures.

UNITED STATES CIVIL SERVICE COMMISSION
APPEALS EXAMINING OFFICE
WASHINGTON, D.C. 20415

(18 September 1973)

APPEAL OF A. ERNEST FITZGERALD
UNDER PART 351, SUBPART I
OF THE CIVIL SERVICE REGULATIONS

Appeal from the action of the Department of the Air Force in separating the appellant by reduction-in-force from the position of Deputy for Management Systems, GS-17, Step 4, $31,874.00 per annum, Office of the Secretary, Assistant Secretary for Financial Management, Washington, D.C., effective January 5, 1970.

INTRODUCTION

By letter dated January 20, 1970, John Bodner, Jr. and William L. Sollee, Attorneys at Law, submitted an appeal to this office in behalf of Mr. A. Ernest Fitzgerald. Investigation was conducted and numerous lengthy submissions to the file were received from both the appellant and the agency. The appellant

raised a question as to the bona fides of the reduction-in-force (RIF) as it was applied to him, contending that the RIF was used as a subterfuge to conceal the agency's action in firing him because of his November 13, 1968 testimony of the C-5A cost overruns. Since Mr. Fitzgerald was a preference eligible and the various submissions to the file did constitute a prima facie showing that the reduction-in-force may have been based upon an intention to separate the appellant for cause rather than for a nonpersonal reason, a hearing was scheduled to inquire into the circumstances surrounding the RIF.

The agency was requested and agreed to make available to testify Secretary of the Air Force Robert Seamans, Assistant Secretary Spencer Schedler, Administrative Assistant to the Secretary John Lang, Deputy Administrative Assistant Thomas Nelson, Air Force Chief of Staff General John D. Ryan, Comptroller of the Air Force Lieutenant General Duward Crow, Director of Office of Special Investigations (OSI) Brigadier General Joseph J. Cappucci, and Colonel James D. Pewitt.

In accordance with the Civil Service regulations in effect at that time, the hearing was not open to the public. However, a verbatim transcript of the proceeding was prepared by an independent court reporting firm. The hearing was conducted on May 4, 5; June 16, 17, 18, and 22, 1971. On the latter date the hearing was suspended in compliance with a temporary restraining order and subsequent injunction issued by the U.S. District Court for the District of Columbia relative to the issue of an "Open Hearing." The hearing, open to the public, resumed on January 26, 1973 after all litigation on this issue had been completed. Additional hearing sessions were held on January 29, 30, 31; February 2, 28; March 5, 6, 7, 20, 21, 22, 28, 30; April 3, 4, 5, 6, 19; and May 3, 1973.

. . . .

[See Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), where the court held Fitzgerald had a right to an open and public hearing before the Commission in his appeal for reinstatement to his Federal employment.]

ANALYSIS AND FINDINGS

By letter dated November 4, 1969 the agency gave Mr. Fitzgerald notice of his proposed separation by reduction-in-force, effective January 5, 1970, due to the abolishment of this position, "necessitated by a reorganization under the current Air Force retirement program."

. . . .

Turning now to the reduction-in-force action itself, the agency's position is that as a part of Defense Department's Project 703, the Air Force was required to reduce expenditures one (1) billion dollars in fiscal year 1970. This involved large cut-backs in military and civilian personnel nationwide and in the headquarters staff of the Department. Each office in the Secretariat was given a specific number of reductions to be effected. SAFFM was assigned a net reduction of two (2) spaces. As part of a reorganization of that office five (5) positions were abolished and three (3) new positions were established. Of

the five (5) positions abolished Mr. Fitzgerald's was the only professional position. The other four (4) were secretarial positions.

The agency contends that the abolishment of Mr. Fitzgerald's position, initiated by Assistant Secretary Spencer J. Schedler and approved by Secretary Robert Seamans, was based upon a valid management decision to reorganize SAFFM in order to improve its cost effectiveness capability and at the same time achieve the required reduction of two (2) spaces.

The agency further contends that Secretary Seamans and Assistant Secretary Schedler were not in office at the time of Mr. Fitzgerald's November 1968 testimony; that they alone were responsible for the decision to reorganize the financial management office; that the testimony Mr. Fitzgerald gave a year earlier was not the reason or a reason for their decision; and that neither had sought or received any instructions to abolish the appellant's position.

Mr. Fitzgerald contends that the RIF as applied to him was not for non-personal reasons and was, in essence, an agency adverse action based upon his November 13, 1968 testimony on the C-5A cost overruns.

The record reveals that out of the 80 positions abolished in the Office of the Secretary of the Air Force, Mr. Fitzgerald was the only employee who actually was issued a RIF notice and who was actually separated by RIF (L/N 723-724). As his part of the Project 703 reductions, Assistant Secretary Schedler was required to take a cut of two (2) spaces. He accomplished this by abolishing four (4) secretarial positions plus Mr. Fitzgerald's position and creating three (3) new positions.

The Air Force, through the testimony of witnesses and documentary evidence, did show that a reorganization of SAFFM had taken place; that the appellant's position had been abolished and not recreated; and that there was some need to reorganize in addition to reducing the office staff by two (2) positions.

The appellant has not questioned the validity of the Project 703 reductions and the resultant reduction-in-force, only the agency's decision to abolish his position and include him in that RIF.

The reduction-in-force system as provided for by Statute and Commission regulations is a system for releasing employees from their competitive levels when their release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment or restoration rights. The system is predicated upon the concept of competition for retention based upon tenure, veterans preference, length of service, and performance rating.

Reduction-in-force may be necessary because of conditions inside or outside the agency. Agency management may reduce certain phases of its work as the workload changes. Appropriations may be reduced or cut-off entirely, or the agency may be allowed to use only part of its appropriations. These and other factors occurring singly or in combination may make it necessary for the agency to have a reduction-in-force.

Reduction-in-force may require the separation of all employees in part of an agency or may require separation of some and shifting about of others.

Small reductions may require no involuntary separations when there are enough transfers, retirements, and other voluntary losses. Some reductions, in fact, require no reduction in the number of employees but are accomplished through reorganization.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located, and where they are to be filled, abolished, or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct, or compete in reduction-in-force.

These are management responsibilities and the management determinations regarding these responsibilities are not ordinarily subject to review . . . in a reduction-in-force appeal.

It would be a valid and proper exercise of its management prerogative for an agency faced with the necessity for reducing its force to select for abolishment those functions and/or positions that are least necessary to the accomplishment of, or are making the least substantive contribution to, the agency's mission.

In this situation the lack of substantive contribution may be due to a change in the agency's mission or its method or approach to the accomplishment of its mission. It may also be that the lack of substantive contribution is due to the incumbent of the position.

Inherent in the Commission's reduction-in-force system and one of its fundamental precepts is that it be used only for reasons that are non-personal to the employees affected. The reduction-in-force system must not be used to remove inadequate or unsatisfactory employees in lieu of following the Commission's adverse action procedures set forth in Part 752 of the Civil Service Regulations.

Federal Personnel Manual Chapter 351, Subchapter 1 states in part as follows:

> "1-9. IMPROPER USE OF REDUCTION IN FORCE
>
> There sometimes has been a tendency to distort the reduction-in-force system by using it to eliminate inadequate employees."

Thus, an allegation that the RIF was a subterfuge to conceal an agency removal action taken without following the adverse action procedures, when supported by a sufficient showing that the RIF action may have been based upon a non-personal reason for reducing the force, goes directly to the question of the bona fides of the RIF and will be reviewed on appeal.

In order to properly evaluate the propriety of the RIF action as applied to Mr. Fitzgerald it is essential that we review and analyze the circumstances leading up to and surrounding the decision to abolish his position and to include him in the project 703 RIF.

From our review of the complete appellate record including all submissions by both parties and the transcript of the hearing (26 days), we find the circumstances to be as follows:

Mr. Fitzgerald received an excepted appointment to the position of Deputy for Management Systems, Office of the Assistant Secretary of the Air Force for Financial Management (SAFFM) on September 20, 1965 (AF-1/30/70, Attachment #4). While no specific time limit was established as to the length of this appointment, it is clear from Mr. Fitzgerald's testimony of his conversations with the then Assistant Secretary, Dr. Leonard Marks, that it was to be for only a few years (TR 2618-2621).

Assistant Secretary Marks resigned on December 31, 1967 and was succeeded by Thomas H. Nielsen who was appointed Assistant Secretary for Financial Management on January 1, 1968 (L/N 366). Mr. Nielsen submitted a proposed reorganization plan for his office dated January 9, 1968 (AF-6/25/70, P-253) focusing additional attention on cost performance, designating the appellant as the focal point for this effort and proposing increasing his staff.

Mr. Fitzgerald was first contacted by the Proxmire Committee in the Summer of 1968 to testify on the C-5A (TR 2720-2722). This request was put into writing by Senator William Proxmire on October 18, 1968 (APP-1/20/70, Attachment #2).

The file contains unrefuted allegations and testimony that there was high level Air Force and DOD opposition to Mr. Fitzgerald testifying.

Mr. Fitzgerald did testify before the Proxmire Committee on November 13, 1967 and discussed possible cost overruns on the C-5A plane. This testimony received a great deal of publicity for it was the first public disclosure of cost overruns on that project.

. . . .

Mr. Fitzgerald visited the Civil Service Commission on January 10, 1969 to complain of the alleged loss of tenure and his supervisor's statement that his usefulness to the Air Force was at an end. Therefore, Assistant Secretary Nielsen prepared a memorandum for record (M.Ex #7, 1/13/69 attachment). This memo states that Mr. Nielsen reviewed the entire matter of the tenure controversy with Mr. Fitzgerald who stated that he mailed a copy of the first SF-50 to the Committee immediately after the conclusion of the November 13, 1968 hearing and that when the second form was received it was mailed directly to the Proxmire Committee. The memo also states that Mr. Nielsen told the appellant "I felt his actions in this connection had ended his usefulness to the Air Force."

Secretary Seamans testified it was his belief that Mr. Fitzgerald released the SF-50's in the tenure controversy in order to obtain publicity and to place the Air Force in a bad light (TR 430-431, 435-437); that his actions inflamed the situation; exacerbated relations between Mr. Fitzgerald and people in the Secretariat; and "that's when it became much more of a confrontation" (TR 480-481). Secretary Seamans also stated that Mr. Fitzgerald was a celebrity and a controversial person at the time as a result of the press releases concerning the tenure controversy (TR 438-439).

Colonel Pewitt testified that Assistant Secretary Nielsen gave Mr. Fitzgerald the "Lang Memo;" that Mr. Nielsen felt Fitzgerald "had betrayed a personal confidence" by the way the memo was handled; and that Mr. Nielsen lost confidence in the appellant and his usefulness to the Air Force (TR 1991-1992). Colonel Pewitt also stated that he thought Mr. Fitzgerald's days in the Air Force were numbered and that he might be leaving because of the tenure-nontenure publicity and the Lang Memo (TR 2121-2122).

It is clear that the "Lang Memo" and Secretary Nielsen's declaration that Mr. Fitzgerald had lost his usefulness to the Air Force both stemmed from the Washington Post January 1, 1969 front page article erroneously implying that the appellant lost his career tenure in retaliation for his testimony on the cost overrun in the C-5A project. It is also evident that the Air Force considered Mr. Fitzgerald responsible for this erroneous implication reaching the news media.

. . . .

Assistant Secretary Nielsen considered Mr. Fitzgerald's usefulness to the Air Force to be at an end as of January 8, 1969. Therefore, he obviously did not include Mr. Fitzgerald in his proposed reorganizations of February 26, 1969 and May 5, 1969. Mr. Nielsen's last proposal is essentially the same as the reorganization Assistant Secretary Schedler, with Secretary Seamans' approval, finally put into effect. This reorganization abolished Mr. Fitzgerald's position and led to his separation by RIF on January 5, 1970.

Mr. Schedler testified that he did not decide to abolish Mr. Fitzgerald's position until late September or early October 1969. However, Secretary Seamans and Secretary Laird came to the decision that Mr. Fitzgerald had to leave the Air Force much earlier than Mr. Schedler was willing to admit. They were busy looking for another position outside the Air Force for the appellant as early as May 1969. One of the positions under consideration was with the Fitzhugh Blue Ribbon Panel, previously discussed.

Secretary Seamans denied being instructed directly, or ordered by anyone to terminate Mr. Fitzgerald. However, he initially declined to respond to any and all questions concerning possible communications he may have had with, or any advice received from, the White House staff regarding Mr. Fitzgerald. This declination was based on the doctrines of Executive Privilege and privileged communications. Secretary Seamans was advised by this examiner (TR 499) as follows:

> "Mr. Secretary, I am without authority to order you to answer the question. If the answer to the question becomes relevant and material, all I can do is to take into consideration your refusal to answer the question."

Secretary Seamans subsequently testified that at some point in time prior to Mr. Fitzgerald's job being abolished he did receive some advice from the White House; however, he refused to discuss it any further (TR 839).

By letter dated August 2, 1973, with a copy to the agency representative, appellant's attorney submitted a copy of a January 20, 1970 internal White House memo from Alexander Butterfield to Mr. H.R. Haldeman that had just

been discovered. The agency was offered but declined the opportunity to comment. This memo states:

> "You'll recall that I relayed to you my personal comments while you were at San Clemente, but let me cite them once again-partly for the record-and partly because some of you with more political horse sense than I will probably want to review the matter prior to next Monday's press conference.
>
> "--Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty; and after all, loyalty is the name of the game.
>
> "--Last May he slipped off alone to a meeting of the National Democratic Coalition and while there revealed to a senior AFL-CIO official (who happened to be unsympathetic) that he planned to "blow the whistle on the Air Force" by exposing to full public view that Service's 'shoddy purchasing practices.' Only a basic no-goodnik would take his official business grievances so far from normal channels. As imperfect as the Air Force and other military services are, they very definitely do not go out of their way to waste Government funds; in fact, quite to the contrary, they strive continuously (at least in spirit) to find new ways to economize. If McNamara did nothing else he made the Services more cost-conscious and introspective-so I think it is safe to say that none of their bungling is malicious . . . or even preconceived.
>
> "--Upon leaving the Pentagon-on his last official duty-he announced to the press that 'contrary to recent newspaper reports,' he was not going to work for the Federal Government, but instead, was going to 'work on the outside' as a private consultant.
>
> "We should let him bleed, for a while at least. Any rush to pick him up and put him back on the Federal payroll would be tantamount to an admission of earlier wrong-doing on our part.
>
> "We owe 'first choice on Fitzgerald' to Proxmire and others who tried so hard to make him a hero."

The information contained in the memo concerning Mr. Fitzgerald's May 1969 statements at a meeting of the National Democratic Coalition had not previously come to light in this proceeding. In the light of Secretary Seamans' refusal to furnish testimony on conversations he had with, or advice he received from the White House Staff; and our notification to the Secretary (TR 499), quoted supra, we must conclude and do hereby find that Mr. Fitzgerald's May 1969 statements were the subject of Secretary Seamans' discussion with the White House staff. We must also conclude and do hereby find that these statements by Mr. Fitzgerald were one of the underlying reasons for the decision to abolish Mr. Fitzgerald's position and to terminate his employment with the Air Force.

. . . .

Our findings, supra, reveal many instances of dissatisfaction with Mr. Fitzgerald. In addition, Secretary Seamans testified (TR 964) that:

"It is obvious from the testimony these past three days that I was not satisfied with Mr. Fitzgerald's performance. I made no pretense that I was."

After carefully reviewing the complete appellate record and in view of all of the foregoing analysis, findings, and conclusions, we find that the agency's decision to abolish Mr. Fitzgerald's position and to include him in the Project 703 reduction-in-force improperly resulted from and was influenced by reasons purely personal to the appellant; and was for the purpose of terminating his employment with the Air Force.

Secretary Seamans, in discussing his dissatisfaction with Mr. Fitzgerald also stated (TR 964):

"But at the same time it does not give Mr. Fitzgerald immunity against having his job abolished, and the abolition of the job for improvement in our management capability was a separate and distinct step, or action."

It is true that an undesirable, inadequate, or unsatisfactory employee is not immune from having his position abolished. However, the decision to abolish that employee's, or any employee's, position must be based solely on reasons not personal to the employee. These employees must be removed from their positions by other means because the spirit, intent, and letter of the Commission's regulations require that the reduction-in-force system be used for reasons that are not personal to the employees affected. The more an employee is deserving of being fired, the more inappropriate it is to abolish his position and separate him by reduction-in-force.

In the case at hand, where we have found from the evidence of record that the decision to abolish Mr. Fitzgerald's position and to separate him by reduction-in-force was influenced by, and resulted from, reasons that were personal to the appellant; and where the appellant was an employee entitled to the adverse action procedures set forth in Part 752-B of the Civil Service regulations; we find his separation by reduction-in-force to be improper, inappropriate, and contrary to the spirit, intent, and letter of the Commission's regulations.

RECOMMENDATION

Accordingly, we recommend that Mr. Fitzgerald be restored retroactively on January 5, 1970 to the position from which he was improperly separated, or to any other position of like grade, salary, and tenure in the Excepted Service and with the same or similar qualification requirements as his former position. Please furnish this office with a copy of the SF-50 accomplishing the recommended corrective action.

6.6 Grade and Pay Retention.

The Civil Service Reform Act of 1978 provides for grade and pay retention for certain employees whose grade or pay would be reduced in a RIF or a reclassification action. Employees who are not separated from Federal service but who accept positions at lower pay grades may claim the benefits of this statute. Final regulations implementing these new provisions have been published. See 5 C.F.R. Part 536. Consider the impact of these new retention provisions on funding and personnel management; the financial effects of a RIF linger long after the final personnel action has been completed.

5 U.S.C. § 5361. Definitions.

For the purpose of this subchapter--

(1) "employee" means an employee to whom Chapter 51 of this title applies, and a prevailing rate employee, as defined by section 5342(a)(2) of this title, whose employment is other than on a temporary or term basis;

(2) "agency" as the meaning given it by section 5102 of this title;

(3) "retained grade" means the grade used for determining benefits to which an employee to whom section 5362 of this title applies is entitled;

(4) "rate of basic pay" means, in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343 of this title;

(5) "covered pay schedule" means the General Schedule, any prevailing rate schedule established under subchapter IV of this chapter, or the performance management and recognition system under Chapter 54 of this title;

(6) "position subject to this subchapter" means any position under a covered pay schedule; and

(7) "reduction-in-force procedures" means procedures applied in carrying out any reduction in force due to a reorganization, due to lack of funds or curtailment of work, or due to any other factor.

§ 5362. Grade retention following change of positions or reclassification.

(a) Any employee--

(1) who is placed as a result of reduction-in-force procedures from a position subject to this subchapter to another position which is subject to this subchapter and which is in a lower grade than the previous position, and

(2) who has served for 52 consecutive weeks or more in one or more positions subject to this subchapter at a grade or grades higher than that of the new position, is entitled, to the extent provided in subsection (c) of this section, to have the grade of the position held immediately before such placement be considered to be the retained grade of the employee in any position he holds for the 2-year period beginning on the date of such placement.

(b) (1) Any employee who is in a position subject to this subchapter and whose position has been reduced in grade is entitled, to the extent provided in subsection (c) of this section, to have the grade of such employee for the 2-year period beginning on the date of the reduction in grade.

(2) The provisions of paragraph (1) of this subjection shall not apply with respect to any reduction in the grade of a position which had not been classified at the higher grade for a continuous period of at least one year immediately before such reduction.

(c) For the 2-year period referred to in subsections (a) and (b) of this section, the retained grade of an employee under such subsection (a) or (b) shall be treated as the grade of the employee's position for all purposes (including pay and pay administration under this chapter and Chapters 54 and 55 of this title, retirement and life insurance under Chapters 83 and 87 of this title, and eligibility for training and promotion under this title), except-

(1) for purposes of subsection (a) of this section,

(2) for purposes of applying any reduction-in-force procedures,

(3) for purposes of determining whether the employee is covered by the performance management and recognition system established under Chapter 54 of this title, or

(4) for such other purposes as the Office of Personnel Management may provide by regulation.

(d) The foregoing provisions of this section shall cease to apply to an employee who--

(1) has a break in service of one workday or more;

(2) is demoted (determined without regard to this section) for personal cause or at the employee's request;

(3) is placed in, or declines a reasonable offer of, a position the grade of which is equal to or higher than the retained grade; or

(4) elects in writing to have the benefits of this section terminate.

§ 5363. Pay retention.

(a) Any employee--

(1) who ceases to be entitled to the benefits of section 5362 of this title by reason of the expiration of the 2-year period of coverage provided under such section;

(2) who is in a position subject to this subchapter and who is subject to a reduction or termination of a special rate of pay established under section 5305 of this title (or corresponding prior provision of this title); or

(3) who is in a position subject to this subchapter and who (but for this section) would be subject to a reduction in pay under circumstances prescribed by the Office of Personnel Management by regulation to warrant the application of this section; or

(4) who is in a position subject to this subchapter and who is subject to a reduction or termination of a rate of pay established under subchapter IX of Chapter 53;

is entitled to basic pay at a rate equal to (A) the employee's allowable former rate of basic pay, plus (B) 50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay if such allowable former rate exceeds such maximum rate for such grade.

(b) For the purpose of subsection (a) of this section, "allowable former rate of basic pay" means the lower of--

(1) the rate of basic pay payable to the employee immediately before the reduction in pay; or

(2) 150 percent of the maximum rate of basic pay payable for the grade of the employee's position immediately after such reduction in pay.

(c) The preceding provisions of this section shall cease to apply to an employee who--

(1) has a break in service of one workday or more;

(2) is entitled by operation of this subchapter or Chapter 51, 53, or 54 of this title to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or

(3) is demoted for personal cause or at the employee's request.

. . . .

§ 5366. Appeals.

(a) (1) In the case of the termination of any benefits available to an employee under this subchapter on the grounds such employee declined a reasonable offer of a position the grade or pay of which was equal to or greater than his retained grade or pay, such termination may be appealed to the Office of Personnel Management under procedures prescribed by the Office.

(2) Nothing in this subchapter shall be construed to affect the right of any employee to appeal--

(A) under section 5112(b) or 5346(c) of this title, or otherwise, any reclassification of a position; or

(B) under procedures prescribed by the Office of Personnel Management, any reduction-in-force action.

(b) For purposes of any appeal procedures (other than those described in subsection (a) of this section) or any grievance procedure negotiated under the provisions of Chapter 71 of this title--

(1) any action which is the basis of an individual's entitlement to benefits under this subchapter, and

(2) any termination of any such benefits under this subchapter, shall not be treated as appealable under such appeals procedures or grievable under such grievance procedures.

CHAPTER 7

MERIT SYSTEMS PROTECTION BOARD - PRACTICE AND PROCEDURES

7.1 Statutory Power and Authority of MSPB.

The MSPB is a quasi-judicial body created by the Civil Service Reform Act of 1978. It consists of three members appointed by the President with the advice and consent of the Senate for nonrenewable terms of seven years. The MSPB's jurisdiction is limited specifically to matters made appealable to it by law and regulation. Its powers are spelled out in its enabling statute, Title 5 United States Code, Section 1204.

5 U.S.C. § 1204 Powers and Functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall-

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2033 of title 38, or any other law, rule, or regulation, and subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

. . .

(4) review, as provided in subsection (f) of this section, rules and regulations of the Office of Personnel Management.

(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual --

(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from and responses to written interrogatories by, any such individual.

(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by the Board, the

United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(e)(1)(A) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(B)(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to an investigation by the Office of Special Counsel from the Board during such investigation.

(2)(A) In enforcing compliance with any order under subsection (a)(2) of this section, the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

Most details concerning the MSPB's appellate jurisdiction and procedures in MSPB appellate actions are established by statute. Employees subjected to an "appealable" personnel action file their appeals initially with an MSPB regional or field office and the case is assigned to an administrative judge (AJ).

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right-

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b) (1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) if an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection(e), unless--

(i) the deciding official determines that the granting of such relief is not appropriate; or

(i)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection(e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)III) that presents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(c) (1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision-

(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment--

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d) (1) In any case in which--

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office; the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e) (1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless--

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion. The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may--

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently, if the deciding official or officials hearing

the cases are of the opinion that the action could result in the appeals being processed more expeditiously and would not adversely affect any party.

(g) (1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)).

. . . .

Note. The remainder of 5 U.S.C. § 7701 addresses the authority of the MSPB to establish alternative methods of settling cases and with the requirement on the MSPB to announce publicly when it will complete appellate consideration of each case. "Mixed cases" or appeals involving allegations of discrimination are processed under a special procedure outlined in 5 U.S.C. § 7702, which is reprinted in Chapter 9 of this casebook.

7.2 MSPB Regulations.

a. Jurisdiction. The Board's regulations describe the two types of jurisdiction it exercises and the types of cases in which each is exercised. The most common type of case before the MSPB is, by far, under its appellate jurisdiction. These are the typical appeals by employees from personnel actions.

5 C.F.R. § 1201.3 Appellate jurisdiction.

(a) Generally. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions:

(1) Reduction in grade or removal for unacceptable performance (5 C.F.R. part 432; 5 U.S.C. § 4303(e));

(2) Removal, reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will promote the efficiency of the service. (5 C.F.R. part 752, Subparts C and D; 5 U.S.C. 7512);

(3) Removal, or suspension for more than 14 days, of a career appointee in the Senior Executive Service (5 C.F.R. part 752, Subparts E and F; 5 U.S.C. §§ 7541-7543);

(4) Reduction-in-force action affecting a career appointee in the Senior Executive Service (5 U.S.C. § 3595);

(5) Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 C.F.R. 531.410; 5 U.S.C. 5335(c));

(6) Determinations affecting the rights or interests of an individual or of the United States under the Civil Service Retirement System or the Federal Employee's Retirement System (5 C.F.R. parts 831 and 842; 5 U.S.C. §§ 8347(d)(1)-(2) and 8461(e)(1));

(7) Disqualification of an employee or applicant because of a suitability determination (5 C.F.R. § 731.401);

(8) Termination of employment during probation or the first year of a veterans readjustment appointment, when (i) the employee alleges discrimination because of partisan political reasons or marital status; or (ii) the termination was based on conditions arising before appointment and the employee alleges that the action is procedurally improper (5 C.F.R. 315.806, 38 U.S. C. § 2014(b)(1)(D));

(9) Termination of appointment during a managerial or supervisory probationary period when the employee alleges discrimination because of partisan political affiliation or marital status (5 C.F.R. 315.908(b));

(10) Separation, reduction in grade, or furlough for more than 30 days, when the action was effected because of reduction in force (5 C.F.R. 351.901);

(11) Furlough of a career appointee in the Senior Executive Service (5 C.F.R. 359.805);

(12) Failure to restore a former employee to employment following military service, or following partial or full recovery from a compensable injury (5 C.F.R. 353.401);

(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force or after partial or full recovery from a compensable injury (5 C.F.R. 302.501, 5 C.F.R. 330.202);

(14) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 C.F.R. 352.508);

(15) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 C.F.R. 352.209);

(16) Failure to re-employ a former employee after detail or transfer to an international organization (5 C.F.R. 352.313);

(17) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 C.F.R. 352.707);

(18) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 C.F.R. 352.807); and

(19) Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 C.F.R. 300.104).

(b) Appeals involving an allegation that the action was based on appellant's "whistleblowing." Appeals of actions appealable to the Board under any law, rule, or regulation, in which the appellant alleges that the action was taken because of the appellant's "whistleblowing (a violation of the prohibited personnel practice described in 5 U.S.C. 2302(b)(8)), are governed by part 1209 of this title. The provisions of Subparts B, C, E, F, and G of part 1201 apply to appeals and stay requests governed by part 1209 unless other specific provisions are made in that part.

(c) Limitations on appellate jurisdiction, collective bargaining agreements and election of procedures:

(1) For an employee covered by a collective bargaining agreement under 5 U.S.C. § 7121, the negotiated grievance procedures contained in the agreement are the exclusive procedures for resolving any action that could otherwise be appealed to the Board, with the following exceptions:

(i) an appealable action involving discrimination under 5 U.S.C. § 2302(b)(1), reduction in grade or removal under 5 U.S.C. § 4303, or adverse action under 5 U.S.C. § 7512, may be raised under the Board's appellate procedures or under the negotiated grievance procedures, but not under both;

(ii) any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

(2) Choice of procedure. When an employee has an option of pursuing an action under the Board's appeal procedures or under negotiated grievance procedures, the Board considers the choice between those procedures to have been made when the employee timely files an appeal with the Board or timely files a written grievance, whichever event occurs first.

(3) Review of discrimination grievances. If an employee chooses the negotiated grievance procedure under paragraph (c)(2) of this section and alleges discrimination as described at 5 U.S.C. § 2302(b)(1), then the employee, after having obtained a final decision under the negotiated grievance procedure, may ask the Board to review that final decision. The request must be filed with the Clerk of the Board in accordance with § 1201.154.

(d) Appealability not affected by retirement status or election. In determining the appealability of an action to the Board under any law, rule, or regulation, neither the status of the appellant under any retirement system established under a Federal statute nor any election made by the appellant under such system may be taken into account.

Note 1. MSPB review of the removal of a probationary employee under 5 C.F.R. § 1201.3(a)(8) is extremely limited. MSPB has jurisdiction only if the probationer demonstrates that (1) the removal was based on discrimination because of marital status or political affiliation or (2) the limited procedural rights set out in 5 C.F.R. § 315.806 were not afforded in connection

with a removal based on pre-employment reasons. For cases interpreting these narrow grounds for appellate jurisdiction, see Bedynek-Stumm v. Dep't of Agriculture, 57 M.S.P.R. 176 (1993); McChesney v. Dep't of Justice, 55 M.S.P.R. 512 (1992); Gribben v. Dep't of Justice, 55 M.S.P.R. 257 (1992); Shah v. GSA, 7 M.S.P.R. 626 (1981); Uriarte v. Department of Agriculture, 6 M.S.P.R. 393 (1981); Van Daele v. USPS, 1 M.S.P.R. 601 (1980).

Note 2. An employee adversely affected by a reduction in force or the denial of a within grade ("step") increase may generally appeal to the MSPB (see 5 C.F.R. §§ 1201.3(a)(5) and (10)); however, if the employee is a member of a bargaining unit and the collective bargaining agreement does not specifically exclude RIF actions and denials of step increases from grievance and arbitration coverage, the employee must use the negotiated grievance procedure to challenge the action. No MSPB jurisdiction exists in such circumstances. Sirkin v. Department of Labor, 16 M.S.P.R. 432 (1983) (RIF); Lovshin v. Department of Navy, 16 M.S.P.R. 14 (1983) (denial of step increases). See 5 C.F.R. § 1201.3(c).

b. Hearing Procedures.

The hearing procedures for cases before the Board are contained in 5 C.F.R. Part 1201. Subpart B contains procedures for appellate cases and Subpart D contains procedures for original jurisdiction cases.

c. Discovery. The MSPB regulations set forth below provide for discovery using the Federal Rules of Civil Procedure as a general guide.

5 C.F.R. § 1201.71 Purpose of Discovery

> Proceedings before the Board will be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed to prepare the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. Parties are expected to start and complete discovery with a minimum of Board intervention.

5 C.F.R.§ 1201.72 Explanation and scope of discovery.

> (a) Explanation. Discovery is the process, apart from the hearing, by which a party may obtain relevant information, including the identification of potential witnesses, from another person or a party, that the other person or party has not otherwise been provided. Relevant information includes information which appears reasonably calculated to lead to the discovery of admissible evidence. This information is obtained to assist the parties in preparing and presenting their cases. The Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Board. Those rules, however, are instructive rather than controlling.

(b) Scope. Discovery covers any nonprivileged matter that is relevant to the issues involved in the appeal, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons with knowledge of relevant facts. Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.

(c) Methods. Parties may use one or more of the methods provided under the Federal Rules of Civil Procedure. These methods include written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission.

5 C.F.R. § 1201.73 Discovery Procedures.

(a) Discovery from a party. A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in § 1201.73(d), and must specify the time and place of the taking of the deposition, if applicable.

When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency.

(b) Discovery from a nonparty including a nonparty Federal agency. Parties should try to obtain voluntary discovery from nonparties whenever possible. A party seeking discovery from a nonparty Federal agency or employee must start the process by serving a request for discovery on the nonparty Federal agency or employee. A party may begin discovery from other nonparties by serving a request for discovery on the nonparty directly. If the party seeking the information does not make the request, or if it does so but fails to obtain voluntary cooperation, it may obtain discovery from a nonparty by filing a written motion with the filing judge, showing the relevance, scope, and materiality of the particular information sought. If the party seeks to take a deposition, it should state in the motion the date, time, and place of the proposed deposition. An authorized official of the Board will issue a ruling on the motion and will serve the ruling on the moving party. That official also will provide the party with a subpoena, if approved, that is directed to the individual or entity from which discovery is sought. The subpoena will specify the manner in which the party may seek compliance with it, and it will specify the time limit for seeking compliance. The party seeking the information is responsible for serving any Board-approved discovery request and subpoena on the individual or entity, or for arranging for their service.

(c) Responses to discovery requests. (1) A party, or a Federal agency that is not a party, must answer a discovery request within the time provided

under paragraph (d)(2) of this section, either by furnishing to the requesting party the information or testimony requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection.

(2) If a party fails or refuses to respond in full to a discovery request, or if a nonparty fails or refuses to respond in full to a Board-approved discovery order, the requesting party may file a motion to compel discovery. The requesting party must file the motion with the judge, and must serve a copy of the motion shall be served on the other party and on any nonparty entity or person from whom the discovery was sought. The motion must be accompanied by:

(i) A copy of the original request and a statement showing that the information sought is relevant and material; and

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. § 1746 supporting the statement (see Appendix IV.)

(3) The other party and any other entity or person from whom discovery was sought may respond to the motion to compel discovery within the time limits stated in paragraph (d)(4) of this section.

(d) Time limits.

(1) Parties who wish to make discovery requests or motions must serve their initial requests or motions within 25 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.

(2) A party or nonparty must file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place.

(3) Any motion to depose a nonparty (along with a request for a subpoena) must be submitted to the judge within the time limits stated in paragraph (d)(1) of this section or as the judge otherwise directs.

(4) Any motion for an order to compel discovery must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel discovery must be filed with the judge within 10 days of the date of service of the motion.

(5) Discovery must be completed within the time the judge designates.

5 C.F.R. § 1201.74 Orders for discovery.

(a) Motion for an order compelling discovery. Motions for orders compelling discovery and motions for the appearance of nonparties must be filed with the judge in accordance with § 1201.73(c)(2) and (d)(4).

(b) Content of Order. Any order issued will include, where appropriate:

(1) A provision that the person to be deposed must be notified of the time and place of the deposition;

(2) Any conditions or limits concerning the conduct or scope of the proceedings or the subject matter that may be necessary to prevent undue delay or to protect a party or other individual or entity from undue expense, embarrassment, or oppression.

(3) Limits on the time for conducting depositions, answering written interrogatories, or producing documentary evidence; and

(4) Other restrictions upon the discovery process that the judge sets.

(c) Noncompliance. The judge may impose sanctions under ' 1201.43 of this part for failure to comply with an order compelling discovery.

How does 5 C.F.R. § 752.404(b), which gives an employee the right to review material "relied upon" to support a proposed action, affect the scope of discovery? the following case examines this issue.

Bize v. Department of the Treasury
3 M.S.P.R. 155 (1980)

OPINION AND ORDER

The appellant is a Criminal Investigator, GS-12, with the Internal Revenue Service, Baton Rouge, Louisiana. He was suspended for 30 days for failure to safeguard his pocket commission and enforcement badge and failure to prevent them from being improperly used. He appealed to the Board's Dallas Field Office. In the initial decision, issued September 17, 1979, the presiding official found the reasons for the actions supported by a preponderance of the evidence and sustained the suspension action. The petition for review set forth some 21 asserted errors or exceptions to the initial decision. The assertions shall be discussed individually below. . .

The reasons on which the appellant's suspension was based grew out of an incident which occurred at the Alexandria, Louisiana Airport on the night of December 26, 1977. The appellant was not on duty on that date. Following a family dinner at his grandmother's home, the appellant took his uncle,

Samuel O. Foster, to the airport for a return flight to his home in California, first stopping for some drinks.

Though some of the details and circumstances are in dispute, as will be seen, it is clear that the appellant and his uncle arrived at the airport some time before the flight was scheduled to depart. The airline ticket agent told them the flight was delayed. The appellant and his uncle went for some drinks rather than wait at the airport. Ultimately, upon return to the airport, Mr. Foster found he had missed his flight and in the ensuing arguments with airline personnel he displayed the appellant's pocket commission to the airline ticket salesperson to show he was not "without influence."

In March, 1978, the airline official contacted his congressman to complain about the incident. After congressional inquiry concerning the matter, the Internal Revenue Service had it investigated. After the "Report of Investigation" was submitted, adverse action against the appellant was initiated.

The appellant was specifically charged with:

(1) Failure to adequately safeguard his pocket commission and enforcement badge, in violation of IRM 0735.1, Text 223.7.

(2) Failure to prevent his pocket commission and enforcement badge from being improperly used in violation of IRM 0735.1, Text 223.7.

The agency presented the incident in the specification to reason 2 as follows:

> On December 26, 1977, your pocket commission and enforcement badge was used by Mr. Steve Foster, your uncle, to intimidate Mr. Bruton Dawkins, an airline official. You were present when the incident started; you saw that Mr. Foster had your pocket commission and enforcement badge in his hand while he was berating the airline official. You did not retrieve your credentials during the altercation or restrain Mr. Foster for having improper possession of them. They were subsequently used by Mr. Foster, after you had left the scene, to intimate the airline official.

The appellant said that he was unaware that his uncle had his badge, and that as soon as he found out he escorted his uncle out of the terminal.

. . . .

Allegation 4 is that the presiding official erroneously refused to order the agency to produce the "Report of Investigation." The report was prepared by an inspector of the Internal Security Division of the IRS. The proposing official, Mr. Hinchman, testified that he received the report, but on cross-examination it appeared that he may have relied only on portions of the report. The deciding official did not see the whole report.

In a pre-hearing motion, appellant had initially requested the presiding official to order the agency to produce the entire report. . . . The agency's position was that it did not rely on the full report and that appellant was supplied with the pages of the report on which it relied--pages 3, 4, 9 and 10. Therefore, the agency contended, since the appellant was not entitled to more

than the material relied on, the request was irrelevant. . . . The presiding official denied appellant's request for the report because it was not necessary to a decision in the case. . . .

The appellant's request for production of the investigation report has been evaluated throughout the proceedings in terms of compliance with 5 C.F.R. 752.404(b), which gives an employee the right to review materials which the agency relied on to support a proposed action. While there was some uncertainty about which material the proposing official relied on . . .the finding that the appellant received the pertinent pages of the investigation report is supported by the evidence. However, we conclude that 5 C.F.R. 752.404(b) was erroneously interpreted as limiting appellant's right to only that evidence on which the agency relied.

5 C.F.R. 752.404 speaks to the procedures which an agency must follow when proposing and executing an action under 5 U.S.C. 7513. The section 752.404 process does not, and was not intended to, provide an employee an adversary hearing with all the concomitant rights that such a process connotes. Section 752.404 guides an agency during its processing of a 5 U.S.C. § 7513 action, but it is not a limitation upon the rights of appellants in appeals under 5 U.S.C. § 7701 and accompanying regulations.

Prior to enactment of the Civil Service Reform Act, the majority view was that the right accorded employees in section 752.404(b) defined that evidence an agency was required to produce. Hoover v. United States 513 F.2d 603, 606 (Ct. Cl. 1975); Heffron v. United States, 405 F.2d 1307 (Ct. Cl. 1969). More recently the U.S. Court of Appeals, in a decision to the contrary, viewed the issue in terms of due process instead of the narrow ambit of the regulation, and held that the appellant was entitled to production of the relevant report absent any valid claim of privilege by the agency. McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

The McClelland decision is even more persuasive when considered in conjunction with the Board's regulations, which were not applicable to the case, since the extent of discovery procedures available in an administrative hearing is primarily determined by the particular agency. McClelland, supra, at 1258. The Board's discovery procedures are set forth at 5 C.F.R. 1201.71 et seq. While a presiding official may exclude evidence from a hearing because it is repetitious, 5 C.F.R. 1201.62, there is no provision which allows for the exclusion of evidence because the agency did not rely on it.

In 5 C.F.R. 1201.75, the Board stated that guidance in discovery matters may be obtained from the Federal Rules of Civil Procedure, but that such "rules should be interpreted as being instructive rather than controlling." While it is clear that the FRCP are not of legal effect in cases before the Board, they offer guidance in the area of discovery and should be studied by presiding officials.

Particularly instructive to the issues of this case is FRCP 26(b), which sets forth the scope of discovery; it reads, in pertinent part, as follows:

(b) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis supplied)

Following the lead case of Hickman v. Taylor, 329 U.S. 495 (1947), courts have liberally interpreted the meaning of "relevant" for purposes of discovery. The U.S. Court of Appeals has held that evidence is relevant, for discovery purposes, as long as it is "germane" to the subject matter. Local 13, Detroit Newspaper Union v. N.L.R.B., 598 F.2d 267, 271 (D.C. Cir. 1979). It should be kept in mind that relevancy for purposes of discovery is different from the question of admissibility. Thus, if evidence which is not admissible is likely to lead to the discovery of admissible evidence, it is relevant for purposes of discovery. Rozier v. Ford Motor Co., 573 F.2d 1332, 1342 (5th Cir. 1978).

The Board's presiding officials have been given similar authority in relation to discovery requests. In 5 C.F.R. 1201.72, discovery is defined as "the process whereby a party may obtain information . . . for the purposes of assisting . . . in planning and developing his/her case." Evidence which assists in planning a case may or may not be admissible, but as in FRCP 26(b), it is discoverable.

Since one of the main functions of the Board is the adjudication of cases within its jurisdiction, 5 U.S.C. § 1205, the fairness of such adjudications can only be enhanced by disclosure of the facts in a case. Therefore, uncertainty as to the relevancy of requested evidence should be resolved in the favor of the movant, absent any undue delay or hardship caused by such request. . . .

The evidence denied appellant in this case was central to the case. The report detailed an investigation conducted into the charges which were subsequently levied against appellant, and selected portions of the report were relied on by the agency. It is reasonable to infer that the report contains summaries of witness interviews which were not disclosed to appellant. Without imputing any bad faith to the agency, it is reasonable to conclude that even if they were not exculpatory in nature, such summaries could lead to exculpatory evidence, or other witnesses. Considering that the agency had resources to conduct interview nation-wide, access to the report would be helpful to the appellant, if for no other reason than to assist him in deciding how to commit his resources. Notably, production of the report would have

placed no burden on the agency, nor would it have delayed the proceedings. Therefore, we conclude that the presiding official erroneously denied appellant's request for production of the full report and, if necessary, rule on any claims of privilege advanced by the agency. . . Assuming no valid privilege prevents production of the report, the presiding official must determine if further proceedings are appropriate and issue a new initial decision taking into consideration the evidence and arguments advanced after production of the report insofar as they raise matters not already fully decided herein. . . .

Accordingly, the initial decision is VACATED and the case is REMANDED for further consideration consistent with this Opinion.

Failure to comply with an order for discovery issued by an administrative judge may result in serious sanctions.

5 C.F.R. § 1201.43 Sanctions.

The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to the circumstances set forth in paragraphs (a), (b), and (c) of this section.

(a) Failure to comply with an order. When a party fails to comply with an order, the judge may:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) Prohibit the party failing to comply with the order from introducing evidence concerning the information sought, or from otherwise relying upon testimony related to that information;

(3) Permit the requesting party to introduce secondary evidence concerning the information sought; and

(4) Eliminate from consideration any appropriate part of the pleadings or other submissions of the party that fails to comply with the order.

(b) Failure to prosecute or defend appeal. If a party fails to prosecute or defend an appeal, the judge may dismiss the appeal with prejudice or rule in favor of the appellant.

(c) Failure to make timely filing. The judge may refuse to consider any motion or other pleading that is not filed in a timely fashion in compliance with this subpart.

Consider the effect on the agency of such a sanction in the following case.

Fuller v. Department of the Treasury
10 M.S.P.R. 13 (1982)

The appellant was suspended for 30 days for using a Government vehicle to transport his wife from her workplace to their residence and using a Government vehicle to travel on personal business. The agency charged him with violating 31 U.S.C. § 638a(c)(2). Misuse of a Government Vehicle. A 30-day suspension is the minimum statutory penalty for such a violation. The appellant argued that he was disparately treated in that other employees in similar situations were either not charged at all or were charged with violations of minor rules with lesser penalties. The appellant requested, and the presiding official ordered the agency to produce documents relating to disciplinary actions taken against other employees for unauthorized use of a Government vehicle. The agency refused to comply with that order and the presiding official declined to impose sanctions for that refusal, concluding that sanctions would not serve the end of justice. He then upheld the agency action. In his petition for review, the appellant argued that the presiding official erred in failing to impose sanctions. OPM intervened arguing that the agency has discretion to determine whether misuse has occurred in terms of 31 U.S.C. § 638a(c)(2), and that once the agency makes that determination, it must comply with the statutory penalty. The Board found that the documents sought to be produced could have led to the discovery of information relevant to the appeal. The Board held them to be within the types of materials subject to discovery under 5 C.F.R. 1201.72. The Board stated that it does not serve "the end of justice" to permit an agency to deny an appellant materials relevant to the development of his case or to ignore an agency's direct disobedience of a presiding official's proper order. It concluded that the presiding official in the instant case abused his discretion in not imposing sanctions. The Board found that the most appropriate sanction was that found at 5 C.F.R. 1201.43(a)(4), and thereby struck all of the agency's pleadings and submissions. It then found that the agency was unable to meet its burden of proof and reversed the suspension action.

At Appendix A are sample forms for use in MSPB discovery.

7.3 Proving Your Case Before the MSPB.

a. Standard of Review of Agency Actions. Under 5 U.S.C. § 7701(c)(1), the MSPB applies two different standards of proof in reviewing agency personnel actions: "(1) Personnel actions based on unacceptable performance described in 5 U.S.C. § 4303 must be supported by substantial evidence;
(2) All other personnel actions must be supported by a preponderance of the evidence." The legislative history of this portion of the 1978 Civil Service Reform Act demonstrates a clear

congressional intent to grant agencies more discretion and flexibility in removing employees for unacceptable performance.

In Parker v. Defense Logistics Agency, 1 M.S.P.R. 505 (1980), the MSPB described how it views both standards:

> Unlike the preponderance standard, which requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue, the substantial evidence standard requires only evidence of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions. This standard precludes the Board's presiding official from substituting his or her own judgment for that of the agency. It obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's decision (even though other reasonable persons including the presiding official might disagree with that decision).

Appeals to the MSPB of agency denials of within grade pay increases are tested by the same standard of review as Chapter 43 unacceptable performance actions -substantial evidence. Romane v. Defense Contract Audit Agency, 706 F.2d 1286 (Fed. Cir. 1985). But see Schramm v. Department of Health and Human Services, 682 F.2d 85 (3d Cir. 1982).

b. Evidentiary Issues.

The agency taking an action against an employee has the burden of proving by substantial evidence (performance actions) or a preponderance of the evidence (all other cases) that the action is justified. The extent to which hearsay evidence may be used to meet that burden is discussed in detail in the following MSPB decision.

Borninkhof v. Department of Justice,
5 M.S.P.R. 77 (1981)

OPINION AND ORDER

> This proceeding is before us on a petition for review of an initial decision sustaining a 40-day suspension imposed under 5 U.S.C. § 7513(b). Appellant, a border patrol agent of the Immigration and Naturalization Service of the Department of Justice, was suspended for 40 days on three charges set forth in a letter of proposed action.
>
> . . . .
>
> Appellant timely appealed the suspension and requested a hearing. In his appeal, appellant, insofar as is pertinent here, denied the specifications underlying the first charge; denied the specifications underlying the second

charge, except with respect to the no contest plea; and contended that the allegations in the third charge were "overstated." It is thus clear that appellant's appeal was based on serious disputes of material facts. Resolution of those facts was essential to a disposition of this appeal.

At the hearing, the agency called two witnesses. Both testified as to the first and second charges based on their reading of the investigatory record. Neither witness had been present at any of the incidents referred to, nor had they talked to anyone who had been present. One witness, the second-line supervisor, also testified as to the third charge on the basis of a conversation he had with the first-line supervisor, who reported appellant's conduct and language to him, and on the basis of which the second-line supervisor had prepared a memorandum in the investigatory record. Appellant repeatedly objected to the testimony by these witnesses as hearsay because he was unable to cross-examine them on the substance of the information in the investigatory report. He was consistently overruled.

The presiding official found that all three charges and the specifications under each had been proved by a preponderance of the evidence; and that, therefore, the agency action promoted the efficiency of the service. He affirmed the agency action. His initial decision relied solely on evidence included in the agency's investigatory file and did not mention the testimony of the agency witnesses.

In his initial decision, the presiding official first addressed the question of the agency's failure to produce any witnesses for cross-examination on the disputed material facts. He concluded that appellant had not been denied due process. The presiding official concluded that the agency had no mandate under 5 U.S.C. § 7701 or 5 C.F.R. § 1201.24(c) to produce any witnesses at the hearing. He further concluded that appellant could have subpoenaed as witnesses the persons knowledgeable about the incidents on which the specifications were based and that appellant's election not to do so defeated his claim of denial of due process.

In resolving the disputed facts under the first two charges, the presiding official relied entirely on statements made during the investigation by the ranch manager, his son (the ranch foreman), the arresting deputy sheriff, two other deputy sheriffs, a guard on the ranch, and a jailer. None of the statements were signed. Each statement contained a preface that it was given freely and voluntarily, that the declarant was under oath, and that the declarant was willing to sign a transcript of the tape, providing it was a true and correct copy. Neither the declarant, nor the transcriber, nor the investigator who conducted the interviews testified at the hearing.

Appellant, who did testify, and three witnesses called by him, whose statements were also included in the investigatory file, disputed materially the hearsay testimony and the other statements with respect to what had transpired at the ranch, the jail, and the bar. Moreover, it was demonstrated at the hearing that two sentences had been omitted from the statement of one witness. The omitted sentences tended to exculpate appellant.

The initial decision states that appellant challenged the use of the statements of the other declarants because he could not verify their accuracy, and he argued to the presiding official that the statements had little probative value because they were unsigned. The presiding official found that any omission in the prior statements of appellant's witness had been cured by his testimony and found that the statements of the witnesses generally conformed to their testimony, and, thus, the lack of signature on the witnesses' prior statements did not reduce their probative value. He made no similar findings with respect to the other statements and could make none because the other declarants did not testify, and the agency's witnesses had no knowledge other than what they had read in the investigatory file.

The presiding official accepted as accurate and credible almost all the information in the unsigned statements of the other declarants. . . . The presiding official balanced the live testimony of appellant and his three witnesses, all subjected to cross-examination, against the unsigned statements that formed the basis of the agency's case as to events at the ranch and the jail. The presiding official proceeded to discount the live testimony of appellant and his witnesses because there was "evidence that alcohol was involved." This evidence was recited from the unsigned statements and was contradicted by live testimony. The presiding official did not state why unsigned statements without more had sufficient weight to constitute probative evidence that would support the agency's burden of proof.

In his petition for review, appellant contends that the agency's evidence was totally hearsay, lacking in probative value, and insufficient to meet the preponderance of the evidence test and that to affirm the initial decision would constitute a denial of due process. The agency's cryptic response to these arguments is that "the record speaks for itself."

It bears emphasizing that on an appeal from an adverse action under 5 U.S.C. § 7513(b), the agency has the burden of proof and must sustain the burden of proof by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Contrary to the initial decision, we think it is irrelevant in this case whether appellant could have called the declarants as witnesses. The only question before us is whether the agency has sustained its burden of proof by a preponderance of the evidence it produced in this case.

We note that the agency's hearsay evidence was properly admitted at the hearing under well-settled law that relevant hearsay evidence is admissible in administrative proceedings. We are also fully aware that hearsay evidence has been held to constitute substantial evidence in some circumstances. We conclude nevertheless that the agency's hearsay evidence is insufficient in the circumstances of this case to sustain the agency's burden of proof by a preponderance of the evidence.

Richardson v. Perales is the landmark case recognizing that hearsay may constitute substantial evidence. In that case, the Supreme Court held that hearsay evidence alone was sufficient to defeat a claimant's appeal from a denial of social security disability benefits by the Secretary of Health, Education and Welfare, despite contradictory live testimony of claimant and

his personal physician. The hearsay evidence, consisting of five medical reports by physicians who had examined the claimant, was considered substantial evidence. The Court, first, however, expressed its confidence in the underlying reliability and probative value of the medical reports. The Court then concluded that the integrity of the administrative process was not damaged by reliance on the medical reports to refute the contradictory live testimony. Thus, Perales, while holding that hearsay alone may constitute substantial evidence, has not, we think, changed the traditional test used both before and after that decision, that the assessment of the probative value of hearsay evidence necessarily rests on the circumstances of each case. Rather, Perales has been perceived as a rejection of any rule that hearsay may not per se constitute substantial evidence. We adopt that interpretation of Perales.

It still remains for the trier of fact to weigh the probative value of the hearsay evidence in the circumstances of the case. In Perales, the Court noted that the medical reports had been prepared routinely by unbiased physicians who had examined the claimant, that such reports were regularly used in the agency's adjudication of hundreds of thousands of disability claims, and that courts had recognized their reliability even in formal trials and had admitted them as an exception to the hearsay rule. In other cases where hearsay alone has been held sufficient to sustain an agency action other factors entered into the court's determination of the reliability and trustworthiness and, hence, probative value of the hearsay evidence. For example, in Peters v. United States, an agency action was sustained both on the testimony of persons who had spoken to the absent declarants of signed sworn statements and on the signed sworn statements. The court relied heavily on the fact that the witness who testified had spoken to the affiants, and it was possible to test the credibility of the witness testifying as to the hearsay, the accuracy of his recollection of the hearsay statement, and his ability and opportunity to observe the affiant and hear what was said of the hearsay. The court also noted the lack of subpoena power that disabled the agency from calling the affiants.

In School Board of Broward County, Florida v. Dept. of HEW, the court found substantial hearsay relied on to support an administrative finding denying eligibility for Federal aid. Following the example of Perales, the court looked for assurance of underlying reliability and probative value to determine whether the hearsay evidence constituted substantial evidence. The court stated that two impartial witnesses testified as to statements made to them, that direct evidence was unavailable, that there was no subpoena power for the agency to call witnesses to give direct testimony, and, thus, the case rested on the only available evidence, which was uncontradicted by the School Board.

More recently in Schaefer v. United States, the U.S. Court of Claims affirmed an agency's removal action and held that statements regarding plaintiff's misconduct, signed by three of his co-workers, were of sufficient probative force to constitute substantial evidence. The court found sufficient assurance of the truthfulness of this hearsay evidence, relying on the fact that the individuals signed their respective statements and another person witnessed their doing so and also signed the statement. While noting that in appropriate

cases uncorroborated hearsay could constitute substantial evidence, the court pointed out that the statements in this case all contained corroboration in the administrative record.

In other cases decided since Perales, courts have not hesitated to dismiss hearsay evidence as insubstantial under the circumstances of the case. In Reil v. United States, the court found it could not rationally choose to believe statements that lacked authentication, that conflicted with other statements made by a declarant who was not impartial, and that were denied by live testimony.

In McKee v. United States, the court found the hearsay evidence lacking in sufficient assurance of its truthfulness to overcome sworn live testimony of a claimant where the hearsay evidence (captions on pictures) was unsworn and its authorship was unknown. The court observed, however, that had the hearsay evidence been the best available and had the Government asked the Board to accept it, "the situation could have been entirely different."

In Browne v. Richardson, the court refused to give substantial weight to a medical report prepared by a physician who neither examined the claimant of disability benefits nor testified at the hearing. In Martin v. Secretary of HEW, the court similarly refused to consider a report prepared by a physician who had not examined the claimant as substantial evidence. The court held that "an examination of a claimant adds such significant weight to a medical opinion as to the presence or absence of disability that, without it, the opinion, standing alone, cannot constitute substantial evidence to support a conclusion which relies solely on it. . . .

In Henley v. United States, the court also concluded that the agency's evidence, which was quite similar to the evidence presented in the instant case, was devoid of substantiality. In that case, the agency presented two live witnesses, who were agency employees but who had no direct personal knowledge of the charges against the plaintiff, as well as documentary evidence consisting of mostly unsworn and unsigned statements. The court noted that the entirety of the evidence presented against the plaintiff was non-expert testimony in a situation where the credibility of witnesses was crucial. In criticizing the evidence, the court stated that not only was the evidence primarily unsworn hearsay, but it could not depend on any of the factors that ordinarily redeem hearsay. The court explained: "the already undesirable nature of hearsay was compounded by the inability of the witnesses to verify anything about credibility.

In Cooper v. United States, the Court of Claims recently found that the decision to terminate an employee on the basis of alleged acts of sexual misconduct was not supported by substantial evidence where the removal was based upon information contained in four paragraphs of an investigatory report. The contents of the report consisted of data excerpted from state arrest records, a police officer's report of interviews with witnesses, and an interview with an investigator. The court, noting that the agency's investigator failed to take the stand at plaintiff's hearing, concluded that this type of evidence was "attenuated and highly unreliable," and at best was "triple hearsay." Although

plaintiff never denied the charges against him, and neither testified on his own behalf nor produced any witnesses attesting to his innocence at the hearing, the court believed the inferences from such inaction were insufficient to overcome the lack of evidence supporting plaintiff's removal.

In sum, the judicial precedents examining the weight to be given hearsay evidence, particularly documentary evidence such as an administrative record, included the following facts in considering the probative value of the hearsay evidence:

(1) the availability of persons with first-hand knowledge to testify at the hearing;

(2) whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing;

(3) the agency's explanation for failing to obtain signed or sworn statements;

(4) whether declarants were disinterested witnesses to the events, and whether the statements were routinely made;

(5) consistency of declarant's accounts with other information in the case, internal consistency, and their consistency with each other;

(6) whether corroboration for statements can otherwise be found in the agency record;

(7) the absence of contradictory evidence;

(8) credibility of declarant when he made the statement attributed to him.

At the same time, judicial precedent has held no more than that hearsay evidence may be "substantial" evidence to support an administrative determination upon judicial review. As emphasized earlier, we are bound by the statutory standard that precludes our sustaining an agency adverse action under Chapter 75 unless the agency's action is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(2)(B).

Hearsay evidence that meets the "substantial" standard may not have sufficient probative value or weight to meet the preponderance standard. These standards have been distinguished and set forth by the Board in Parker v. Defense Logistics Agency for the benefit of presiding officials. The substantial evidence standard requires evidence only of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions, while the preponderance standard requires evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue.

It must therefore be determined whether the agency's evidence in this case has sufficient reliability in the face of contradictory sworn live testimony to meet the preponderance standard. That determination must be made on the basis of the entire record before the Board.

By not relying on the testimony of the agency's witnesses to support any of his findings of fact, the presiding official presumably did not accord the

testimony any probative value. If that was his intention, then he was correct. The agency witnesses' testimony on the first and second charges was wholly without probative value. The declarants had never made any statements on the subject in the presence of the witnesses. The witnesses were therefore unable to verify the accuracy of the transcriptions or recount what they heard and saw, or in any way assess the probativeness of the statements when they were being made. The Board's judgment in this case is consistent with the judgments in Browne and Martin, in which the court refused to accept as substantial evidence reports of physicians who had not examined the claimant.

But in ignoring the agency's testimony and relying on the investigatory record, the presiding official did not avoid the problem of hearsay. The presiding official has, in effect, subsequent to the hearing, treated the agency's case as if it had simply offered the investigatory record at the hearing without introducing witnesses.

The statements that form the basis for the presiding official's findings of fact are hearsay, nevertheless, and the circumstances in which they are relied on dictate what weight they should have in this case. Before accepting the statements as sufficient to sustain the agency's action, a reasonable judgment must be made as to their probative value, using the factors outlined above. The presiding official failed to make that judgment. We do so now.

The case is before us in this posture: In the face of contradictory live testimony at the hearing, the presiding official has accepted the agency's unsigned hearsay statements, without more, as dispositive of disputed facts that the agency must prove. The agency has offered no explanation as to why it did not obtain the declarant's signatures on their statements and/or have someone witness the statements; neither has the agency explained why it failed to present any witnesses with first-hand knowledge at the hearing. These statements are patently not like medical reports. Although the statements were consistent with each other, the declarants were actors to a greater or lesser degree in the incidents at issue and cannot be considered disinterested; the statements were not routinely made; nor have statements of this kind traditionally enjoyed judicial acceptance at hearings.

Moreover, here the evidence must be sufficient to sustain the burden of proof, not merely meet a claimant's evidence. The statements are fundamentally of a kind that cannot, without more, be accorded the weight of substantial evidence. In addition, by being unsigned, not even the declarants have signified the accuracy of the transcriptions or the truth of the statements. Furthermore, the fact that two sentences tending to exculpate appellant were omitted from the transcripts diminishes the probative value of these statements. While appellant apparently had the opportunity to review the statements prior to the hearing and to subpoena the declarants to appear at the hearing, the burden is not upon appellant to call witnesses that the agency needs to prove its case.

We are therefore not prepared to find on this record that the agency's evidence is sufficient to establish that the contested facts are more probably true than untrue. We agree with the court's criticism in Henlnishes the

probative value of these statements. While appellant apparently had the opportunity to review the statements prior to the hearing and to subpoena the declarants to appear at the hearing, the burden is not upon appellant to call witnesses that the agency needs to prove its case.

We are therefore not prepared to find on this record that the agency's evidence is sufficient to establish that the contested facts are more probably true than untrue. We agree with the court's criticism in Henley of an agency's reliance on evidence merely consisting of two live witnesses without first-hand knowledge of the charges against plaintiff and unsworn and unsigned statements. It serves no purpose to speculate what other evidence might have satisfied the agency's burden in this case. It should be apparent, however, that direct testimony by the declarants, if available, would have avoided the pitfalls of reliance on hearsay evidence.

On the basis of the whole record, including appellant's and his witnesses's sworn, contradictory testimony, the agency's unsigned statements do not rise to a probative value sufficient to resolve the factual disputes favorably to the agency. We hold that the agency has failed to sustain its burden of proof on the first two charges by a preponderance of the evidence.

On the third charge, insubordination, appellant did not materially dispute what happened as set out in the memorandum in the investigatory report. In his appeal, he challenged the charge on the ground that it was "overstated." His testimony and that of his witnesses showed that despite his opposition to the detail, he did go; that the language he used was common among the male employees where he was stationed; that the supervisor to whom he had used the language also used obscene or profane language as much as anyone else. The evidence introduced by appellant on this charge was thus mitigating of any effects his conduct and speech might have had. The initial decision held, nevertheless, that even if commonly used at appellant's duty station, four-letter words were not an acceptable form of verbal communication by an employee, even in anger, to his supervisor and concluded that the charge of insubordination had been proven by a preponderance of the evidence.

Because the incident was not materially disputed and the presiding officer credited the substance of the live testimony, we do not have here the question of the probative value of hearsay testimony. Appellant's undisputed testimony was that his immediate supervisor did not react to appellant's language and did not warn appellant that he might be subject to discipline for using such language. The record shows that it was not the immediate supervisor who provided discipline, but rather the second-line supervisor who testified at the hearing. There is no showing as to how the incident affected the efficiency of the service and under the circumstances we can discern none. Thus, the agency has failed to meet its burden of proof on the third charge.

The petition for review is granted and the initial decision is reversed. This is a final decision of the Merit Systems Protection Board.

The agency is hereby ordered to cancel the appellant's 40-day suspension and to submit evidence of compliance with this decision to the appropriate field office within five days of issuance of this decision.

7.4 Interim Relief.

Following the hearing and closing of the record, the MSPB administrative judge prepares an initial decision. Under the Whistleblower Protection Act of 1989, 5 U.S.C. § 7701(b)(2), an employee who prevails in the initial decision "shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review." Interim relief will generally include an order returning the employee to the job pending a final decision. An agency is not required, however, to award back pay or attorney fees before a final decision. 5 U.S.C. § 7701(b)(2)(C). If the agency determines that returning the employee to the job would be unduly disruptive, the agency has several option: (1) elect to provide the employee with front pay and benefits pending a final decision. See 5 U.S.C. § 7701(b)(2)(B); (2) place the employee in paid, non-duty status if agency determines that employee's presence at worksite would be unduly disruptive. See DeLaughter v. U.S. Postal Svc., 3 F.3d 1522 (Fed. Cir. 1993); Scofield v. Dep't of Treasury, 53 M.S.P.R. 179 (1992) (MSPB has no authority to review determination that reinstatement would be unduly disruptive); or (3) detail or assign the employee to a position other than the former position, or return him to the former position with restricted duties. The employee must receive the same pay and benefits as in the former position. The reinstatement of the employee can and should be achieved through a temporary appointment pending outcome of the petition of review. Avant v. Dep't of Navy, 60 M.S.P.R. 467 (1994).

The MSPB will dismiss an agency's petition for review of the initial decision unless the agency has complied with the requirements for interim relief before the date the petition for review is due and submits the proof with the petition for review. 5 C.F.R. § 1201.115(b)(4). Shaishaa v. Dep't of Army, 60 M.S.P.R. 359 (1994); White v. U.S. Postal Svc. 60 M.S.P.R. 314 (1994); Reid v. U.S. Postal Svc., 61 M.S.P.R. 84 (1994);Ralph v. Department of Treasury, 55 M.S.P.R. 566 (1992); Labatte v. Department of Air Force, 55 M.S.P.R. 37 (1992); Ginocchi v. Department of Treasury, 53 M.S.P.R. 62 (1992); Schulte v. Department of Air Force, 50 M.S.P.R. 126 (1991); Dean v. Department of Air Force, 50 M.S.P.R. 103 (1991); Baughman v. Department of Army, 49 M.S.P.R. 415 (1991). An employee may challenge the agency's compliance with an interim relief order by moving to dismiss the agency's petition for review. DeLaughter v. U.S. Postal Svc., 3 F.3d 1522 (Fed. Cir. 1993); Ginocchi v. Dep't of Treasury, 53 M.S.P.R. 62 (1992); Crespo v. United States Postal Service, 53 M.S.P.R. 125 (1992).

It is key to remember, do NOT cancel the underlying action if the AJ orders interim relief. The appeal then becomes moot! Cain v. Defense Comrnissary Agency, 60 M.S.P.R. 629 (1994); Trotter v. Dept. of Defense, 54 M.S.P.R. 563, 564 (1992).

7.5 Award of Attorney's Fees in MSPB Cases.

The MSPB may require an agency to pay reasonable attorney fees incurred by an appellant, employee, or applicant who prevails before the Board. The employee must prove that fees are "warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." 5 U.S.C. § 7701(g)(1).

When is an employee a prevailing party? When is an award warranted in the interest of justice? The Court of Appeals for the Federal Circuit discussed the availability of attorney fees under both the CSRA and the WPA in the following case.

Hamel v. President's Commission on Executive Exchange,
987 F.2d 1561 (Fed. Cir.), cert. denied,
114 S.Ct. 342 (1993).

On November 29, 1990, the Director of the PCEE issued a notice of proposed removal to petitioner. The grounds stated in the notice were misconduct and insubordination. On December 18, 1990, petitioner filed an individual right of action appeal with the Board, pursuant to the Whistleblower Protection Act of 1989, Pub.L. No. 101-12, 103 Stat. 16 (1989) (WPA). Among other things, petitioner contended that his proposed removal was in retaliation for what he claimed were whistleblowing activities.

On May 2, 1991, President Bush signed an Executive Order abolishing the PCEE and charging the Director of OPM with the responsibility of winding down the PCEE's functions. On May 7, 1991, OPM issued reduction-in-force notices to the PCEE's competitive service employees. Thereafter, on May 13, 1991, it sent a letter to petitioner rescinding the notice of proposed removal and clearing the allegations of misconduct from his personnel file. On June 10, 1991, an administrative judge of the Board issued an initial decision dismissing petitioner's appeal as moot. His decision became the final decision of the Board on July 15, 1991.

On July 22, 1991, petitioner moved for an award of attorney's fees under the WPA. In the alternative, he sought an award of such fees under the Civil Service Reform Act of 1978, Pub.L. No. 95-454, 92 Stat. 1138 (1978) (CSRA). The administrative judge denied the motion because he determined that petitioner was not a "prevailing party" within the meaning of either of the statutes. On March 17, 1992, the Board denied petitioner's petition for review. 53 M.S.P.R. 177. This appeal followed.

In reaching his decision on the prevailing party issue, the administrative judge used the test set forth by this court in Cuthbertson v. Merit Sys. Protection Bd., 784 F.2d 370 (Fed.Cir.1986), and on appeal both parties take the position that Cuthbertson enunciates the proper test. Cuthbertson, however, involved the attorney's fees provision of the CSRA. Thus, as a preliminary matter, we must decide whether the Cuthbertson test also should apply in a claim for attorney's

fees under the WPA, since it was under that statute that petitioner challenged his proposed removal, although petitioner sought to recover attorney's fees under both the WPA and the CSRA. The pertinent part of the attorney's fees provision in the WPA states as follows:

If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee or applicant for reasonable attorney's fees and any other reasonable costs incurred.

5 U.S.C. § 1221(g)(1) (Supp. III 1991).

The CSRA provides that the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice

....

5 U.S.C. § 7701(g)(1) (1988).

We conclude that the Cuthbertson test for a prevailing party is appropriate in connection with claims for attorney's fees under the WPA. Although the WPA and the CSRA attorney's fees provisions differ in some respects, they have in common the threshold requirement that there be an initial determination as to whether the person seeking the fees was a prevailing party in the proceedings before the Board. At the same time, there is nothing in the language of the statutes which suggests that Congress intended the term "prevailing party" to mean one thing under the CSRA and another thing under the WPA. Accordingly, we hold that the prevailing party test enunciated in Cuthbertson for attorney's fees claims under the CSRA also applies to attorney's fees claims under the WPA.

Under Cuthbertson, a petitioner is a prevailing party if (1) "he obtained all or a significant part of the relief he sought from the Board" and (2) "the relief achieved is significantly due to the initiation of the Board proceeding." 784 F.2d at 372-73. The administrative judge held, and there is no dispute, that the first part of the Cuthbertson test was satisfied in petitioner's case. After President Bush signed the Executive Order abolishing the PCEE, OPM rescinded the notice of proposed removal directed to petitioner and cleared the allegations of misconduct from petitioner's personnel file. Petitioner clearly obtained "all or a significant part of the relief he sought from the Board."

In holding that petitioner had failed to satisfy the second prong of the Cuthbertson test, the administrative judge stated:

[T]he rescission by OPM of the ... notice of proposed removal is shown to be consistent with its duty to conclude the agency's business. For this reason and because there is absolutely no evidence suggesting that the agency/OPM would have abandoned the adverse action against appellant if the Executive Order had not been issued, I find that appellant has failed to establish that his appeal was a

significant causal factor in the relief he ultimately obtained. Appellant consequently has not established that he was a prevailing party.

.....

For the foregoing reasons, the decision of the Board denying petitioner's motion for attorney's fees is affirmed.

[footnotes deleted].

The MSPB has recently amended the test it will apply in attorney fee awards to determine who is a "prevailing" party.

Ray v. Department of Health and Human Services,
64 M.S.P.R. 100 (1994).

[Facts deleted].

In order to establish entitlement to an award of attorney fees under 5 U.S.C. § 7701, an employee must first show that he is the prevailing party. The Supreme Court held in Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), that the prevailing party standard requires only that a party succeed on any issue in the litigation which achieves some of the benefit that he sought in bringing the action sufficient to change the legal relationship between the parties. In reaching this conclusion, the Court rejected a "central issue" test that measures prevailing party status based on whether the party has prevailed on the central issue in the litigation by acquiring the primary relief sought. The Court held that the central issue test is contrary to the thrust of Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), which indicated that the degree of a party's success in relation to the lawsuit's overall goals is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award.

In Farrar v. Hobby, --- U.S. ----, ----, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992), the Court adhered to its "generous formulation" of the term "prevailing party" in civil rights attorney fee statutes announced in Hensley, and held that, to qualify as the prevailing party, a plaintiff must simply obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement, and that this was effective to change the legal relationship between them. The plaintiff in Farrar was deemed the prevailing party although he won a judgment for only one dollar through litigation in which he first sought $17 million in compensatory damages. The degree of success obtained was not a consideration in determining whether the plaintiff was the prevailing party.

The Board has held that the civil rights attorney fee statute prevailing party concept is equally applicable in awarding attorney fees under 5 U.S.C. § 7701(g)(1) and (g)(2), the two bases of awarding fees in the Civil Service Reform

Act of 1978. Additionally, we follow the more recent guidance provided by the Supreme Court in Farrar, and find that an appellant who obtains an enforceable judgment against the agency, or enforceable relief through a settlement agreement, is the prevailing party. In making this finding, we specifically overrule our decisions holding that, to be a prevailing party, an appellant must have substantially prevailed or have prevailed on a significant portion of his claims.

The appellant in this case, however, is not a prevailing party. He did not obtain an enforceable judgment against the agency, or comparable relief through a consent decree or settlement. See Farrar, --- U.S. at ----, 113 S.Ct. at 573. Although the terms of the administrative judge's compliance initial decision would confer such status, that decision was merely a "recommended" decision. the Board need not accept this recommendation and, in fact, the Board never did.

If the Board had issued a decision either finding that the agency's post-recommended decision actions put it in compliance, or agreeing with the appellant that the declared compliance was not compliance, the appellant would have been a prevailing party. The Board, however, never addressed the recommended decision, and there is therefore no "enforceable judgment" in this case.

.....

Pursuant to the terms of the settlement agreement, the appellant is not a prevailing party. Although the agreement is an enforceable judgment against the agency, it did not "benefit" the appellant, nor did it materially alter the legal relationship of the parties. Garland, 489 U.S. at 790-92, 109 S.Ct. at 1493. It merely constituted an enforceable acceptance by the appellant of the agency's pre-petition for enforcement placement of the appellant in a GS-13 position.

The fact that the appellant had retired before the Board's 1993 acceptance of the settlement agreement is irrelevant to the determination of whether it was an enforceable agreement. Certainly, the agreement is enforceable with respect to the appellant's status prior to his June 1992 retirement. If the agency had agreed, in the settlement agreement, to place the appellant in a GM-14 position, and the appellant had retired eight months later, prior to the Board's issuance of an Opinion and Order dismissing the petition for enforcement and accepting the agreement into the record, the appellant would have been a "prevailing party" with respect to the agreement. Here, however, he is not a "prevailing party" because the terms of the agreement did not "directly benefit the [appellant] at the time of the settlement." See Farrar, --- U.S. at ----, 113 S.Ct. at 573.

The language of the Ray decision tolls a warning bell to those agency attorneys involved in preparation of settlement agreements. It has never been a sound practice to leave open the issue of attorney fees in a settlement agreement. After Ray, it is all the more foolish. Wise counsel will address the issue of fees specifically in any settlement agreement.

Note 1. The MSPB, in Rose v. Department of Navy, 36 M.S.P.R. 352 (1988), awarded attorney fees where an employee's removal was mitigated to a 60-day suspension. The Board found that the Navy had acted arbitrarily, capriciously, or otherwise unreasonable in imposing a removal. The Board further found that the agency knew or should have known that its decision to remove the employee could not withstand Board scrutiny. See also Lambert v. Department of Air Force, 34 M.S.P.R. 501 (1987).

Note 2. In cases where a decision is based on a finding of discrimination or a prohibited personnel practice, the employee recovers attorney fees as a prevailing party. No specific showing that an award of fees is in the interest of justice is required in such cases. See 5 U.S.C. §§ 1221(g)(1) and 7701(g)(2); Kean v. Stone, 968 F.2d 119 (3d Cir. 1993) (market rate where discrimination found).

Note 3. The Board recently amended its interpretation of what constitutes a "prevailing party" under 5 U.S.C. §§ 7701(g)(1) and (g)(2). It previously had required an appellant to "substantially prevail," or receive all or a significant portion of the relief sought. See, e.g., Roth v U.S. Postal Svc., 54 M.S.P.R. 298 (1992). The Board now will award fees to an appellant "who obtains an enforceable judgment against the agency, or enforceable relief through a settlement agreement." Ray v. Dept of Health and Human Svcs., 64 M.S.P.R. 100,105 (1994).

Note 4. A "prevailing" employee may only recover "reasonable" fees. For a general discussion of how reasonable fees are calculated, see Blum v. Stenson, 465 U.S. 886 (1984); Kling v. Department of Justice, 2 M.S.P.R. 464 (1980). For a discussion of how fees are calculated when an employee is represented by a salaried union attorney, see Goodrich v. Department of Navy, 733 F.2d 1578 (Fed. Cir. 1984), cert. denied, 469 U.S. 1189 (1985); Kean v. Department of Army, 41 M.S.P.R. 618 (1989); AFGE, Local 3882 v. FLRA, 944 F.2d 922 (D.C. Cir. 1991). (market rate for union attorney in FLRA proceeding).

Note 5. For a case in which a "prevailing" employee's attorney is sanctioned, and receives no fees, due to an inflated petition; see Keener v. Department of Army 136 F.R.D. 140 (1991) affirmed, 956 F.2d 269 (1992).

CHAPTER 8

JUDICIAL REVIEW OF PERSONNEL ACTIONS

8.1. Judicial Review of MSPB Actions.

a. Statutory Provision. In cases involving decisions or orders by the Merit Systems Protection Board, Congress has specifically outlined by statute the applicable standards, scope, and appropriate venue for review. The jurisdiction of the MSPB and the U.S. Court of Appeals for the Federal Circuit to review Federal personnel actions is limited to actions made reviewable by law and regulation, such as serious adverse actions and reductions-in-force.

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board.

(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be the named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16(c), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Note. The jurisdiction of the U.S. Court of Appeals for the Federal Circuit over final orders of the MSPB became effective 1 October 1982. That jurisdiction is exclusive and replaces the jurisdiction previously exercised by the various Courts of Appeals and the Court of Claims. The Federal Court Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)).

b. Subject Matter Jurisdiction. The Court of Appeals for the Federal Circuit, in Rosano v. Department of the Navy, 699 F.2d 1315 (Fed. Cir. 1983), and in the case which follows, established that the scope of its subject matter jurisdiction is identical to the scope of the subject matter jurisdiction of the Board except for discrimination cases.

Carroll v. Department of Health and Human Services
703 F.2d 1388 (Fed. Cir. 1983).

COWEN, Senior Circuit Judge:

Petitioner in this case seeks review of the final decision of the Merit Systems Protection Board (MSPB or Board) denying her a within-grade pay increase.

. . . .

II. THE JURISDICTIONAL ISSUE

At the threshold we are met with the Government's suggestion that we lack jurisdiction and its assertion that the court's only recourse is to transfer the case to the Court of Appeals for the Eleventh Circuit or the District of Columbia Circuit. The Government's position is based upon the decision of the Court of Claims in Holder v. Department of the Army, 670 F.2d 1007 (Ct. Cl. 1982), that determinations concerning the granting or denying of within-grade step increases pursuant to section 5335 lie within the discretion of the employing agency and consequently are beyond the scope of the Tucker Act (28 U.S.C. ' 1491). When counsel for the Government urged us to transfer the case, he was unaware of this court's decision in Rosano v. Dept. of the Navy (Fed. Cir. No. 32-82, slip op. Feb. 14, 1983), which was handed down after this case was submitted. It appears that he also overlooked the fact that The Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25 (1982)), not only granted this court exclusive jurisdiction in all appeals from the Board under 7703(b)(1), but also removed the limitations which the Tucker Act had theretofore imposed upon the Court of Claims. As this court stated in Rosano, that Act removed from section 7703 the reference to the Tucker Act which is the basis for the holding in Holder. The legislative history of the 1982 Act demonstrates the clear intent of the Congress to confer jurisdiction on this court of all appeals from the Board "including cases in which the Court of Claims did not have jurisdiction." Furthermore, this court pointed out in Rosano that "with respect to cases brought under section 7701, the scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the Board." 5 U.S.C. § 7701 gives the Board jurisdiction over "any action which is appealable to the Board under any law, ruling, or regulation." By the provisions of 5 C.F.R. § 1201.3, a regulation which was in effect at all times pertinent to this action, the Board's appellate jurisdiction includes "(2) denial of within-grade step increases."

Finally, in rejecting the Government's challenge to our jurisdiction, we call attention to the fact that The Federal Courts Improvement Act of 1982 removed all jurisdiction over Board appeals from the other circuits. 5 U.S.C. § 7703.

Consider, however, the possible limitations on this jurisdiction as discussed in the following case. This is one of the classic "rubber ball" cases; it began in 1982 when the Department of Education removed the appellant for unsatisfactory performance. He alleged failure to accommodate handicap in his removal. The case went through the MSPB five times, to the EEOC once, to the Special Panel, into federal district court, and to the Federal Circuit three times. Excerpts of the third decision in the circuit, which reviewed the court's jurisdiction over a request for reconsideration, are reproduced below.

King v. Lynch,
21 F.3d 1084 (Fed. Cir. 1994)

In March of 1982, the Department of Education (agency) removed Lynch from his position based on charges of unsatisfactory work product and writing skills, failure to submit work in a timely manner and failure to follow through on work, and unauthorized absences. This case has had a long history in which Lynch's allegations of handicap discrimination have been considered by the MSPB, the Equal Employment Opportunity Commission (EEOC), a Special Panel convened pursuant to 5 U.S.C. § 7702(d)(1), and the United States District Court for the District of Columbia, as briefly described below. Lynch appealed his removal to the MSPB where he raised an affirmative defense of handicap discrimination based on his epilepsy which the agency allegedly failed to accommodate. See 5 U.S.C. § 7702(a)(1)(B)(iii) (providing for MSPB decision on discrimination issue in agency actions involving discrimination). In an initial decision of the MSPB, a presiding official sustained the agency's action in removing Lynch, finding that the agency had proved the latter two of the above three grounds for its actions. On Lynch's affirmative defense of unlawful discrimination, the presiding official held that Lynch was not a "qualified handicapped employee" under 29 C.F.R. § 1613.202(f) because of the side-effects of drugs required to treat his condition. As a result of this holding, the presiding official did not consider whether the agency had reasonably accommodated Lynch's condition. (Lynch I.)

Lynch did not petition the MSPB for review and the initial decision became the final decision of the MSPB. In accordance with 5 U.S.C. § 7702(b)(1), Lynch then petitioned the EEOC to review the MSPB's decision on the discrimination issue. The EEOC ruled that in holding that Lynch was not a qualified handicapped employee the MSPB had applied an improper legal analysis based on an erroneous interpretation of the Rehabilitation Act and 29 C.F.R. § 1613.202(f). Pursuant to 5 U.S.C. § 7702(b)(5)(B), the EEOC referred the case back to the MSPB for further consideration.

The MSPB then reviewed and reaffirmed its decision in Lynch I. Contrary to the finding in Lynch I, the MSPB concluded that the agency had proved all three of the grounds for its action. Based on this determination, the MSPB sustained the presiding official's finding that Lynch was not a qualified handicapped employee

because the agency had provided reasonable accommodation and yet Lynch could still not perform the essential functions of his position. Lynch v. Department of Educ., 31 M.S.P.R. 627 (1986) (Lynch II).

Because the MSPB's decision appeared to be in disagreement with the EEOC's decision, the case was referred to a Special Panel, as required by 5 U.S.C. § 7702(d)(1). The Special Panel affirmed the MSPB's decision in Lynch II, finding that the MSPB had applied the EEOC's standards. Lynch v. Department of Educ., 31 M.S.P.R. 519 (1986).

Lynch then filed suit under 5 U.S.C. § 7703(b)(2) in the United States District Court for the District of Columbia. Count I alleged that the MSPB in Lynch II had overstepped its statutory authority by reopening the performance decision in Lynch I. Count II alleged that Lynch had been discriminated against and, pursuant to 5 U.S.C. § 7702(e)(3), sought de novo review of the discrimination decisions of the MSPB and Special Panel. The district court granted summary judgment for Lynch on Count I of his complaint; as to Count II, the district court remanded to the MSPB for additional proceedings in light of the EEOC's decision. In doing so, the district court retained jurisdiction over the case, including the merits of Count II. Lynch v. Bennett, 665 F. Supp. 62 (D.D.C.1987).

On remand, the MSPB defined the issue before it solely as "whether the agency had made reasonable accommodations to appellant's handicap" under the Rehabilitation Act. The MSPB held the agency had not accommodated Lynch's epilepsy, that the presiding official in Lynch I erred in her analysis of the issue of handicap discrimination, and that Lynch met his burden of proving discrimination. Accordingly, it ordered Lynch reinstated with full relief. Lynch v. Department of Educ., 37 M.S.P.R. 12 (1988) (Lynch III). After Lynch received his favorable decision in Lynch III, the Director petitioned the MSPB for reconsideration. The MSPB denied the Director's petition, holding that the Director's right to seek review of an MSPB decision under 5 U.S.C. § 7703(d) extended only to board decisions interpreting civil service laws, rules, and regulations under the jurisdiction of OPM. Finding that the Rehabilitation Act was a discrimination law under 5 U.S.C. § 7702 and not a civil service law, the MSPB held that the Director lacked authority to seek review in the case. Lynch v. Department of Educ., 39 M.S.P.R. 319 (1988) (Lynch IV).

The Director then sought review in this court. We vacated the MSPB's dismissal of the Director's petition, ruling that the MSPB did not have authority to determine whether the Director's decision to petition for reconsideration was proper and instructed the MSPB to consider the petition on the merits. This court did not consider the question whether the Rehabilitation Act is a discrimination law or a civil service law for purposes of this court's jurisdiction. Newman v. Lynch, 897 F.2d 1144 (Fed.Cir.1990).

On January 31, 1992, the MSPB decided the merits of the Director's petition for reconsideration in favor of Lynch. It held that its decision in Lynch III that the Department of Education had discriminated against Lynch in violation of the Rehabilitation Act "did not articulate an erroneous legal standard" under the

Rehabilitation Act and 29 C.F.R. § 1613.202(f). Lynch v. Department of Educ., 52 M.S.P.R. 541 (1992) (Lynch V). The Director now petitions this court under 5 U.S.C. § 7703(d) for review of the MSPB's decision in Lynch V.

Both the MSPB and Lynch have filed oppositions to the Director's petition for review of the MSPB's decision, contending that this court lacks jurisdiction to entertain the Director's petition because this is a discrimination case and the Rehabilitation Act, 29 U.S.C. § 794, is not a "civil service law" within the meaning of 5 U.S.C. § 7703(d). The Director has filed a response to the oppositions of the MSPB and Lynch and urges that under the decisions of this court the reference to "civil service law" in § 7703(d) is given broad scope and should include the Rehabilitation Act at issue in this case.

The Director's argument essentially is that any law that can be applied to the civil service should be considered a civil service law for purposes of the Director's right to petition under § 7703(d). Citing the broad definition of "civil service" contained in 5 U.S.C. § 2101(1) (1988), covering "all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services," the Director's petition then observes:

[L]ogic dictates that the term "civil service law ... or regulation" as used in section 7703(d) be given an equally broad reading, so as to ensure that OPM's views upon laws that directly affect Federal civilian personnel management are fully considered.

Because these decisions, in the Director's view, broadly interpret "civil service law, rule, or regulation" as used in § 7703(d) and because the "Director's statutory right to seek judicial review is circumscribed only by the terms of section 7703(d)" the Director contends that the MSPB's decision interpreting the Rehabilitation Act should be considered as interpreting a civil service law and therefore should be appealable by OPM. In support of this, the Director argues that the MSPB's allegedly erroneous interpretation of the Rehabilitation Act and regulation was made pursuant to its authority under 5 U.S.C. § 7702, which is within Title 5, was enacted as a part of the CSRA, and bears upon civil servants. See 5 U.S.C. § 7702(a)(1) (giving the MSPB initial authority to decide discrimination issues). Further, the Director argues that the Rehabilitation Act, although enacted prior to CSRA and not within Title 5, was "incorporated" as part of the CSRA because 5 U.S.C. § 2302, which is a civil service law, prohibits among other things discrimination in violation of the Rehabilitation Act. See 5 U.S.C. § 2302(b)(1)(D) (discrimination in violation of the Rehabilitation Act is a prohibited personnel practice); see also id. § 2301(b)(2) (merit system principle to provide fair and equitable personnel management treatment to employees without regard to handicapping condition). Based on these factors, the Director concludes that the Rehabilitation Act, under this court's decisions, is a civil service law for purposes of § 7703(d). Upon examination, however, it is plain that the Director's arguments fail to consider the clear lines drawn, and the carefully crafted scheme created, by Congress for the judicial review of specified government employment discrimination cases. Thus, for the reasons set forth

below, we conclude that "interpret[ation of] a civil service law, rule, or regulation" as used in 5 U.S.C. § 7703(d) does not encompass interpretation of statutes and regulations relating to employment discrimination as set forth in 5 U.S.C. § 7702(a)(1)(B).

.....

The Rehabilitation Act and the other discrimination laws, although made applicable to federal employers, have broader application and are not themselves civil service laws. The Senate Report and statutory scheme for dealing with discrimination issues demonstrates that Congress intended that there be a consistent interpretation of these laws whether their alleged violation arises within or without the federal government. OPM's petition to this court to review the MSPB's decision, which it views as an erroneous interpretation of the Rehabilitation Act and EEOC regulation, is therefore contrary to the judicial review procedure prescribed by Congress for that consistent interpretation.

Our precedent also affirms the exclusivity of the district courts' jurisdiction over government employment discrimination cases and holds that this court lacks such jurisdiction. In Williams v. Department of the Army, 715 F.2d 1485 (Fed.Cir.1983) (in banc), this court rejected an employee's attempt to obtain bifurcated review of the MSPB's decision by bringing his discrimination claims in the district court and seeking review of his civil service claims in this court. This court held that where jurisdiction lies in the district court under 5 U.S.C. § 7703(b)(2), the entire action falls within the jurisdiction of that court and this court has no jurisdiction, under 5 U.S.C. § 7703(b)(1), over such cases. 715 F.2d at 1491. Because 5 U.S.C. § 7703 provides for exclusive jurisdiction in the district courts in discrimination cases and because this court found that unitary review of MSPB decisions was intended, the court refused to entertain Williams's civil service claims.

.....

In view of the careful distinctions made by 5 U.S.C. § 7702 and § 7703 between discrimination laws and civil service laws, the legislative history of the CSRA, and the different procedural and jurisdictional provisions for judicial review of discrimination cases and other employment cases under the CSRA and this court's decisions, we are convinced that the question left open in the earlier appeal of this case, Newman v. Lynch, 897 F.2d at 1145, must now be answered in the negative. This court does not have jurisdiction to entertain a petition for judicial review under 5 U.S.C. § 7703(d) where OPM's assertion is only that the MSPB erred in interpreting a discrimination law, rule, or regulation. Accordingly, we dismiss the Director's petition for judicial review for want of jurisdiction.

Costs to Lynch.

[footnotes deleted].

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c. Scope of Review. While 5 U.S.C. § 7703(c) clearly limits the court's review to the record, appellants have requested a de novo consideration of the evidence in the record. Consider the response to such a request in the following case.

Polcover v. Secretary of the Treasury
477 F.2d 1223 (D.C. Cir. 1973),
cert. denied, 414 U.S. 1001 (1973)

II.

On November 30, 1964, appellant, a Grade GS-12 Internal Revenue Agent with eighteen years experience in the Federal service and a Veterans Preference Act beneficiary, received a Notice of Proposed Adverse Action from his District Director. The Notice stated, in pertinent part:

It is proposed to both suspend you for not more than thirty days and remove you from the Service in order to promote the efficiency of the Revenue Service for the following reasons:

Charge I: Acceptance of a Bribe

Specification: On or about May 19, 1961, you accepted the sum of $1,000.00 from Mr. Albert M. Goldstein, an accountant of 4 E. 43rd Street, New York, New York, to influence your decision and action in your audit of the 1959 income tax return of his client, R. Carl and Sarah M. Chandler.

Charge II: Failure to Report the Offer of a Bribe

Specification: You failed to report the offer of the bribe set forth in the specification to Charge I above.

III.

Appellant's challenge is not focused solely on the substantiality of the evidence supporting the Commission's determination of removal, but includes allegations of a multitude of procedural errors which he asserts violated his rights under either the Veterans' Preference Act or the United States Constitution. We have considered all (although all are not specifically discussed), and reject all.

We decline to enter into a lengthy discussion of the facts and underlying evidence supportive of the Commission's action. We recognize the limits imposed on our scope of review . . . which bind us to the agency record and preclude a de novo consideration of the evidence. The test is not how we would decide the issue based on the evidence in the record, but whether substantial evidence in the record supports the decision of the Commissioner. See, e.g., Moore v. Administrator, 155 U.S.App.D.C. 14, 475 F.2d 1283 (1973).

The evidence before the Commission's Board of Appeals and Review consisted primarily of that presented to the hearing officer on January 9, 1968, pursuant to the appeal taken to the Regional Commissioner. Included therein is the transcript of the criminal trial testimony of Mr. Goldstein (reasserting that a bribe was given), and Mr. Chandler (disclaiming knowledge of a bribe), a

sworn affidavit of Goldstein to the effect that he had given a $1,000 bribe to appellant in exchange for a favorable audit of Chandler's 1959 income tax return, and various work papers of Goldstein and Chandler tending to support the bribe allegation. Undoubtedly the hearing officer and the various appellate levels after him gave significant weight to the sworn affidavit and testimony of Goldstein. Appellant's evidence consisted chiefly of a complete denial of involvement, his own work papers (which supported the taxpayer's claimed liability, but which were not submitted to the IRS until the day of the alleged bribe), and an attack (which was of some merit) upon Goldstein's credibility. Although we might otherwise view the evidence were we in the legal position of the hearing officer or the Commission, we have little difficulty finding that substantial evidence supports their conclusion that the preponderance of the evidence sustains the specifications and consequent removal. As such, that conclusion must not be altered.

Appellant makes much of the fact that he was acquitted of the parallel criminal charges filed against him, and that the acquittal was in the face of evidence identical to that before the Commission. The difference between proof to a "preponderance" of the evidence, the burden assumed by the agency in administrative proceedings of this nature, and proof "beyond a reasonable doubt," the burden assumed by the Government in criminal prosecutions, is critical. As the second circuit court of appeals stated in Finfer v. Caplin, 344 F.2d 38, 41 (2d Cir. 1965), cert. denied, 382 U.S. 833 . . .(1965):

> The law does not require that the proof which might lead to an administrative determination that removal would be for the best interests of the IRS be of the same quality as would be necessary to convince a jury beyond a reasonable doubt to convict in a criminal case. The jury, to be sure, had not been convinced beyond a reasonable doubt but the Commissioner could well have concluded that the evidence was substantial enough to justify a refusal to reinstate.

See also Silver v. McCamey, 95 U.S.App.D.C. 318, 221 F.2d 873, 875 (1955).

. . . .

Ample opportunity was given to the appellant to raise the existence of procedural defects in the proper forum, at the agency and Commission levels, so that evidentiary hearings and a thorough sounding of the matter could be initiated. Appellant did raise several specific challenges, notably those relating to delay, cross-examination, and substantiality, but until now any infirmities in the powers of the oral reply hearing officer have not even been hinted. The boiler plate language of challenge to all procedures is not the minimum specification of issues we deem necessary.

The fluctuating state of the law could excuse a misdirected challenge to the authority of the oral reply officer, but not the absence of a challenge altogether. Litigation must end somewhere. In this scheme of judicial review that somewhere (as to the issues to be considered on appeal) is the Commission. "Great is the art of beginning, but greater the art is of ending."

Finding no good reason to divert from the general rule the opinion of the district court is
Affirmed.

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d. Standard of Review. While courts have consistently refused to consider the evidence in the record de novo, courts have not always agreed on the particular standard by which they would review the agency's decision based on that evidence. The 1978 Civil Service Reform Act, at 5 U.S.C. § 7703(c), established the standard of review for appeals from decisions of the MSPB.

Consider the representative judicial interpretation of that standard in the following case.

Boylan v. U.S. Postal Service
704 F.2d 573 (11th Cir. 1983)

PER CURIAM:

Vincent Boylan, a City Letter Carrier for the United States Postal Service in Orlando, Florida, appeals a final order of the Merit Systems Protection Board sustaining his suspension and removal from employment because he allegedly disposed of third-class mail scheduled to be delivered on his route. This Court has jurisdiction to review such final orders under 5 U.S.C.A. § 7702(b) (superseded) and 28 U.S.C.A. § 2342(6) (repealed). In this appeal, Boylan claims that the Board's decision is not supported by substantial evidence, . . . and that the suspension and removal were effected without compliance with required procedures.

SUBSTANTIAL EVIDENCE

The incident resulting in Boylan's suspension and removal occurred on January 17, 1981, when the manager of the Moselle Manor Apartments discovered a large quantity of third-class mail under a U-Haul trailer next to a trash dumpster in the apartment complex parking lot.

Boylan's first contention on appeal is that the Board's finding that he disposed of the mail is unsupported by substantial evidence. In reviewing final decisions of the Merit Systems Protection Board, the Civil Service Reform Act of 1978 directs this Court to:

> . . . review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence. . . .

5 U.S.C.A. § 7703(c). Under this standard of review, a court will not overturn an agency decision if it is supported by "such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion." Brewer v. United States Postal Service, 647 F.2d 1093, 1096 (Ct. Cl. 1981), cert. denied, 454 U.S. 1144 (1982), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The question is not what the court would believe on a de novo appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole. Brewer, 647 F.2d at 1096. Evidence supporting the agency's finding, as well as evidence offered in opposition, must be examined. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1950).

The record contains evidence that (1) 163 of the 172 pieces of mail recovered under the trailer were scheduled for delivery on Boylan's route, (2) the postal inspector who collected the mail recognized some of the mail as being the same kind of third-class mail available for delivery that morning from Boylan's postal station, (3) the mail was found in a "fresh and unsoiled" condition, and (4) Boylan had not observed any signs of forced entry into his mail truck or any indication that the mail had been disturbed. Although Boylan suggested that children playing in the area might have been responsible for the incident, he also stated that he had seen no children in the area, and had offered the explanation "simply in a manner of speculation."

Under these circumstances, we conclude that the Board's decision was supported by substantial evidence.

. . . .

PROCEDURAL ISSUES

Boylan contends the Board should have set aside his removal because of four procedural errors committed by the Postal Service. Under 5 U.S.C.A. § 7701(c)(2), the Board may set aside an adverse action against an employee if the employee demonstrates harmful error in the application of the procedures invoked to arrive at that decision. "Harmful error" is defined by regulation as follows:

> Harmful error: Error by the agency in its application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

5 C.F.R. § 1201.56(c)(3).

First, Boylan alleges harmful error in that he received only 16 days notice of his proposed suspension, rather than the 30-day notice required under 5 U.S.C.A. § 7513(b)(1). In upholding the Postal Service, the Board relied on the so-called "crime exception" to the required notice period which allows immediate action when "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. . . ." 5 U.S.C.A. § 7513(b)(1).

Under the regulations, Boylan had the burden of showing that the 16-day notice prejudiced his rights. Although the Postal Service had relied on another

invalid exception in giving the short notice, the Board's determination that Boylan suffered no prejudice because the 16-day notice was justified by the crime exception was not an abuse of discretion.

Boylan contends that the crime exception to the notice requirement cannot be invoked without a showing of criminal intent. The Board has determined in previous decisions that direct proof of criminal intent is unnecessary where the evidence presented to the Board demonstrates that the agency's action was based upon a "reasonable cause to believe" that a crime had been committed. Filson v. department of Transportation, FAA, MSPB Order No. AT075209304 (July 14, 1981), at 8. This interpretation by the Board of its own regulations is entitled to deference. See Udall v. Tallman, 380 U.S. 1, 18 85 S. Ct. 792, 802, 13 L.Ed.2d 616 (1965); Adkins v. Hampton, 586 F.2d 1070, 1073 (5th Cir. 1978). Here, the Postal Service had "reasonable cause to believe" a crime had been committed without a specific showing of intent, and was not required to show a criminal conviction or bring formal criminal charges in order to invoke the crime exception of the notice requirement. See Schapansky v. Department of Transportation, FAA, MSPB Order No. DA075281F1130 (October 28, 1982), at 7.

Although Boylan contends he was denied access to the mail involved in this incident in violation of 5 U.S.C.A. § 7513(e), which requires copies of the agency's proposed action "together with any supporting material" to be furnished to the employee upon request, the record indicates that Boylan examined the mail at his initial interview with the postal inspector on January 21, 1981. A letter dated March 11, 1981 advised the Board that the mail was in the Postal Service's possession and Boylan's representative could examine it by making an appointment to do so. The letter indicated that a copy was sent to Boylan's attorney at that time. In addition, a copy of the letter was served on Boylan and his attorney on April 7, 1981. The Board did not abuse its discretion in concluding that Boylan suffered no harmful error.

Finally, Boylan argues that he was not provided with a copy of the carrier by-pass record introduced at the hearing. This document reflected the number of pieces of mail returned by a carrier to the post office each day. The document's evidentiary impact was cumulative and its introduction into evidence was without objection. It was not mentioned in the Board's initial decision or in its final order. In administrative disciplinary proceedings, where a removal action is based upon substantial evidence and conforms with the law, courts have refused to hold "that every deviation from specified procedure, no matter how technical, automatically invalidates a discharge, especially in the absence of any showing of prejudice." Dozier v. United States, 473 F.2d 866, 868 (5th Cir. 1973); see Anonymous v. Macy, 398 F.2d 317, 318 (5th Cir. 1968), cert. denied, 393 U.S. 1041, 89 S. Ct. 666, 21 L.Ed.2d 588 (1969). Boylan has made no showing that any harm resulted from the procedures followed.

AFFIRMED.

8.2 Judicial Review of Actions Involving Discrimination. The 1978 Civil Service Reform Act established an entirely new procedure for reviewing administratively and judicially those actions involving allegations of employment discrimination. Three levels of administrative review are established, and interlocutory judicial review is permitted at numerous stages in the procedure. The statute and regulations outlining this review are set out in Chapter 9.

8.3 Judicial Review of Other Personnel Actions.

All personnel actions are not appealable to the MSPB under 5 U.S.C. § 7701, and thus are not reviewable under 5 U.S.C. § 7703. Of particular note are actions taken against probationary employees. Consider the limited circumstances when courts will review agency actions against probationary employees.

Wren v. MSPB
681 F.2d 867 (D.C. Cir. 1982)

WALD, Circuit Judge:

This is a petition by a former probationary employee of the Department of the Army ("Army") seeking review of an order of the Merit Systems Protection Board ("MSPB" or "Board") dismissing her appeal from a job termination for lack of jurisdiction. Petitioner claims that her discharge was in retaliation for "whistleblowing" on official mismanagement, waste, abuse of authority and violation of regulations and was therefore a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). She requests that the Board's order be vacated and the case remanded to the Board so that it can review the decision of the Office of Special Counsel of the Board ("OSC") refusing to investigate petitioner's allegation of reprisal for whistleblowing. The OSC's decision to terminate its investigation into the cause of petitioner's dismissal was rendered as a result of a separate petition filed by petitioner at the same time she sought MSPB review. After petitioner's appeal to the Board had been dismissed, the OSC refused to exercise 5 U.S.C. ' 1206 authority to investigate petitioner's allegation, finding that it was more appropriately resolved "under an administrative appeals procedure or applicable grievance procedure." Although we agree that the OSC's failure to investigate the petition in this case was not justified by the reasons given, we cannot afford petitioner any relief in this appeal. If judicial relief from the OSC's inaction lies at all, it must be sought in a separate action. The only matter properly before this court is the Board's decision that it had no jurisdiction over Wren's appeal from the Army's adverse personnel action. We find that decision a correct one. Accordingly, we must affirm the decision of the Board.

I. BACKGROUND

The Army appointed petitioner, Celia A. Wren, Guidance Counselor, GS-1710, Grade 9 at the Wertheim Educational Center, West Germany, on August 21, 1978, and dismissed her on March 9, 1979. The notice of termination stated that petitioner's job performance was unsatisfactory, that petitioner was uncooperative and that she failed to attend job performance seminars. The notice also informed petitioner that she had no right to appeal the Army's decision unless she alleged that it was based upon discrimination. Nevertheless, on March 7, 1979, petitioner appealed to the MSPB, claiming that her termination was a reprisal for whistleblowing regarding agency regulatory violations and mismanagement, and therefore a prohibited personnel practice under Title I, section 101(a) of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 2302(b)(8). Simultaneously, petitioner requested the OSC to undertake an investigation into her allegation pursuant to 5 U.S.C. § 1206(a).

II. THE AGENCY DECISION

After examining the CSRA and regulations promulgated thereto, the Presiding Official held that there was no "right of appeal to the MSPB for excepted service employees who are terminated during a trial period." . . . Consequently, he dismissed the petition for lack of jurisdiction.

On appeal, the Board affirmed the dismissal for the same reason. . . . The Board also observed, however, "that procedures do exist whereby [Wren's] . . . allegation may be investigated by the Special Counsel . . ." Accordingly, the Board referred the petition to the Acting Special Counsel "for such action as she may find appropriate." But by the time the Board referred the petition to the OSC, that office had, apparently, already determined not to conduct any investigation.

As previously noted, petitioner had sought an OSC investigation in March, 1979 at the same time she filed her MSPB appeal. On August 27, 1979, the Special Counsel requested further information regarding the complaint. Documents were sent by petitioner's counsel from West Germany on October 22, 1979, but not received by the OSC until November 19, 1979, four days after the case had been closed for failure to submit the requested information. It does not appear from the record that the case was reopened upon receipt of the documents, or even that petitioner was notified at that time that the case had been closed. Nor was the case later reopened after the Board referred it to the OSC in April, 1980. On September 24, 1980, petitioner wrote to inquire about the status of the OSC investigation, and on October 15, 1980, was informed that her case had been closed almost a year earlier, shortly before the requested information had been received. In addition, the OSC informed petitioner that

> [T]his Office is authorized to receive and investigate allegations of certain activities prohibited by civil service law, rule, or regulation (primarily the prohibited personnel practices set forth in 5 U.S.C. § 2302) and may recommend (but not order) corrective action when it is determined that a prohibited personnel practice has been or is being committed. This Office, however, is not authorized to deal with or seek redress for employee complaints or grievances which may be resolved more appropriately under established complaint, grievance, or appeals procedures unless it involves a prohibited personnel practice specified in 5 U.S.C. § 2302. [5 U.S.C. §§ 1206(a)(1) and (3)]
>
> Upon review of the information you provided, we have determined that your allegations deal with matters that may be resolved more appropriately under an administrative appeals procedure or applicable grievance procedure. We, therefore, will not undertake an investigation in your case at this time.

Thus, so far as it appears on the record, the merits of petitioner's allegation that she had been fired in retaliation for whistleblowing, a prohibited personnel practice, were never investigated by the OSC. Instead, a year after closing the investigation, the OSC directed petitioner to pursue her grievance along a "more appropriate" route, although that route had, in fact, already been declared inaccessible to her (and all probationary employees) by the MSPB.

III. WREN'S PETITION

On June 16, 1980, Wren filed a timely petition in this court for review of the Board's decision dismissing her appeal for lack of jurisdiction. After filing this appeal, petitioner received notice from the OSC that it had closed her case one year earlier. Thus, although this appeal is from the Board's decision to dismiss, petitioner also argues that the case must be remanded to the Board so that it can direct the OSC to fulfill its statutory responsibility to investigate petitioner's prohibited personnel practice allegation, which had been referred to it by the Board. Petitioner stresses the irony of being denied relief by the MSPB which assumed that OSC relief was available and then being denied relief by the OSC which assumed that MSPB relief was available.

Petitioner concedes on appeal that as a non-tenured employee she is "not statutorily entitled, per se, to direct review of her termination by the MSPB." The statute grants only "employees" the right to appeal to the MSPB from an adverse agency personnel action. 5 U.S.C. § 7701(a); see also Piskadlo v. Veterans' Administration, 668 F.2d 82 (5th Cir. 1982). An employee is defined as "an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less. . . ." 5 U.S.C. § 511(a)(1)(A); see also 5 C.F.R. §§ 315.801-.802. At the time of her termination, petitioner had been employed for

approximately nine months. However, petitioner reasons: the Board has jurisdiction over cases involving reprisals against whistleblowers brought to it by the OSC, 5 U.S.C. § 1206(c)(1)(A); and once such matters have been brought to the Board, it rather than the OSC has power to take "final agency action," 5 U.S.C. § 1205(a)(1); therefore the Board's jurisdiction over worthy whistleblower cases will be undermined if petitions to the OSC are not investigated sufficiently to determine whether they have merit. Thus, she argues, the Board has authority here at least to order the OSC to undertake a proper investigation of petitioner's allegation.

Unfortunately, we cannot accept petitioner's statutory construct. Although we agree that the OSC must, under the terms of the Act, investigate an alleged prohibited personnel practice involving reprisals against whistleblowing to the extent necessary to determine whether there is a reasonable probability that the allegation is meritorious, and that it must issue reasons for terminating an investigation, we can find no MSPB authority to enforce these statutory requirements. Therefore, if the OSC fails to perform its statutory duties, as here, relief--if it lies at all--must be sought in a separate action in the district court to compel the OSC to perform its statutory duties. Cf. Dunlop v. Bachowski, 421 U.S. 560 (1975) (5 U.S.C. §§ 702 and 704).

IV. STATUTORY ANALYSIS

A primary purpose of the CSRA was to safeguard employees--tenured and non-tenured-who "blow the whistle" on illegal or improper official conduct. Title I, section 101(a) of the Act proclaims:

> (9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences--
>
> (A) a violation of any law, rule, or regulation, or
>
> (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2301(b)(9). Under the Act, it is a prohibited personnel practice for an official to retaliate against an employee for

> (A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . . .

5 U.S.C. § 2302(b)(8). "Protecting employees who disclose Government illegality, waste, and corruption" was regarded as "a major step toward a more effective civil service." S. Rep. No. 969, 95th Cong., 2d Sess. 8 (1978), reprinted in U.S. Code Cong. & Admin. News 1978, p. 2723, 2730. II House Committee on Post Office and Civil Service, 95th Cong. 1st Sess., Legislative History of the Civil Service Reform Act of 1978 at 1632 (1979) (hereinafter Legislative History). The Senate Report explained:

In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.

Id., U.S. Code Cong. & Admin. News 1978, p. 2730. In a similar vein, the House Report, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 386, reprinted in I Legislative History 760, explained:

Right now, a Federal employee who "blows the whistle" (sometimes even to a congressional committee) on activities at his agency which are a violation of law, mismanagement, abuse of authority, waste of funds or a danger to the public may be more likely to be harassed or fired than praised or rewarded. There is no effective means other than drawn out administrative and court proceedings for a whistleblower to set things right. We all lose when reasonable and constructive criticism of agencies by those who know them best is stifled.

Congress designated the MSPB and the OSC to protect whistleblowers against reprisal.

The MSPB was entrusted with the appellate review authority over agency personnel action formerly vested in the Civil Service Commission. . . . As this court, per Bazelon, J., recently detailed in Frazier v. Merit Systems Protection

Board, 672 F.2d 150, 154-55 (D.C. Cir. 1982) (hereinafter Frazier), there are two routes by which whistleblowing controversies can reach the Board for review: (1) a Chapter 77 appeal from an adverse agency personnel action, which can only be brought by tenured employees, 5 U.S.C. §§ 7701-03; and (2) a section 1206(c)(1)(B) petition for "corrective action" by the OSC. The only route to MSPB review open to petitioner, a non-tenured employee, was via the OSC.

The OSC was modeled after the Office of General Counsel of the National Labor Relations Board ("NLRB"). . . . Both offices are filled by Presidential appointment, 5 U.S.C. § 1204; 29 U.S.C. § 153(d), and operate substantially independently of the agency with which they are associated. 5 U.S.C. § 1206; 29 U.S.C. § 60. The semi-autonomous nature of the OSC, like that of the General Counsel of the NLRB, was deemed necessary to allow it to fulfill its investigative and prosecutorial functions--to investigate illegal employment practices and seek their correction before the MSPB. . . . The sponsors of the CSRA expected the OSC to "serve first and foremost as the protector of employees' rights and as a conduit to prevent reprisals and help agencies purge wrongdoing." Thus, the Special Counsel is, as this court has recently remarked, "an ombudsman responsible for investigating and prosecuting violations of the Act." Frazier, 672 F.2d at 162.

In fulfilling its ombudsman or prosecutorial responsibility, the OSC is required by the Act to investigate an alleged prohibited personnel practice, and, if it terminates that investigation for lack of merit, to issue a written statement of reasons:

> (1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.
>
> (2) If the Special Counsel terminates any investigation under paragraph (1) of this subsection, the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation and the reasons therefor.

5 U.S.C. § 1206(a) (emphasis added); see also 5 C.F.R. 1250. Yet, in this case, petitioner was not informed that her case had been closed until a year later, when it was explained that requested documentation had arrived four days too late and that, in any event, her case was "more appropriately" resolved elsewhere--although by this time the MSPB had dismissed the petitioner's appeal for lack of jurisdiction. . . . So far as we can tell from the record, petitioner's case was never investigated, as the statute requires. Moreover, OSC's belated reasons for termination of the investigation were apparently based upon an inapplicable provision of the statute, and thus were erroneous in law.

The plain language of the statute and the legislative history clearly indicate that while the scope of an initial OSC investigation need only be extensive enough to determine whether there are reasonable grounds to believe a prohibited personnel practice is occurring, has occurred, or will occur, "[s]ome preliminary inquiry will . . . be necessary . . . to determine whether a charge warrants a thorough inquiry." Further, although the legislative history indicates that the statement of reasons for termination of the OSC's investigation need not be "detailed" and that the OSC has discretion to decide what form notice should take, it is equally clear that "a brief notification of the summary reasons for the termination" is required. Informing petitioner a year after closing the investigation that her case was more appropriately resolved elsewhere, particularly after the MSPB had held that it had no jurisdiction over her appeal, did not, in our view, conform to the statutory mandate. Although the OSC may routinely defer action on a prohibited personnel practice when a matter is pending before the MSPB, 5 C.F.R. § 1251.2, that was not the situation here when the OSC issued a statement of reasons. Further, the OSC's reason for termination, i.e., the availability of other processes, erroneously relied upon a provision of the statute, 5 U.S.C. § 1206(e)(2), which is inapplicable to petitioner's case. That provision states that "no investigation" is allowed, if more appropriate avenues of relief are available, of allegations involving

> (D) activities prohibited by any civil service law, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and
>
> (E) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

It is apparent from our reading of the statute and the legislative history that section 1206(e)(2) was an additional grant of authority to the OSC to investigate practices which would not come within its section 1206(a) prohibited personnel practice jurisdiction. Thus, we disagree with the Government's argument that the OSC's response in this case was justified under 5 U.S.C. § 1206(e). The authority vested in the OSC under that "special" situation provision is "[i]n addition to" the OSC's primary authority and responsibility to investigate and to seek correction of prohibited personnel practices, such as whistleblowing. 5 U.S.C. §§ 1206(a) and 2302(b); . . . ("The new section 1206(e) authorizes the Special Counsel to investigate allegations of the Hatch Act and certain other special matters.") (emphasis added). This additional authority in no way detracts from the OSC's duty under section 1206(a). Indeed, we find nothing in the statute to qualify the OSC's authority and responsibility to investigate an employee's allegation of retaliation for whistleblowing at least to the extent of ascertaining if that complaint is meritorious.

V. DISPOSITION

The case is here on review of the MSPB's order dismissing a probationary employee's appeal for lack of jurisdiction. The petitioner understandably wants some remedy for the OSC's failure to perform its statutory duty to initiate some kind of inquiry into the merits of an allegation of retaliation for whistleblowing. As we see it, this is a non-discretionary aspect of the OSC's statutory responsibility. Seemingly, then, there should be a remedy for petitioner where the OSC has failed to perform even that initial inquiry into the whistleblowing allegation, and its reasons for inaction are legally invalid. However, the proper remedy for the OSC's failure cannot be an appendage to this appeal from a legally correct decision of the Board that it had no jurisdiction to consider petitioner's appeal from her job termination.

We remain troubled, however. In enacting the CSRA, Congress sought to create an efficient system for protecting all employees from reprisals for whistleblowing. The only remedy available under the CSRA for a probationary employee alleging a dismissal in reprisal for whistleblowing is OSC oversight. By failing to investigate petitioner's complaint and to issue a valid statement of reasons for termination, the OSC has not fulfilled its charge and has thereby cast doubt upon the efficacy of a new and promising statutory system for protecting whistleblowers.

It is possible--although obviously we do not decide the point--that petitioner may have an action for mandamus in the district court to compel some form of inquiry into the merits. [Footnote deleted]. Quicker still would be a voluntary reopening of Wren's case by the OSC in order to conduct whatever inquiry is necessary to determine whether her allegation of retaliatory discharge for whistleblowing is meritorious.

For the foregoing reasons, the petition is denied.

So ordered.

Note. The Whistleblower Protection Act of 1989 allows whistleblowers (i.e., employees who allege a violation of 5 U.S.C. § 2302(b)(8)) to take their own case to the Merit Systems Protection Board, if OSC fails to act within 120 days. See 5 U.S.C. § 1214(a)(3). This is commonly referred to as the individual right of action (IRA).

8.4 Constitutional Tort Actions.

Federal employees have also attempted constitutional tort claims against their supervisors under Bivens v. Six Unknown Names Agents, 403 U.S. 38 (1971), to obtain review of personnel actions. This approach has largely been unsuccessful because of the Supreme Court's decision in Bush v. Lucas, 403 U.S. 367 (1983), in which the Court stated that claims arising out of an employment relationship that is governed by comprehensive procedural and

substantive provisions giving meaningful remedies against the United States preclude supplementing that regulatory scheme with new nonstatutory damages remedy. Following the Bush decision, however, several circuit courts refused to apply Bush to personnel practices that Congress had elected to exclude from coverage under civil service rules. Kotarski v. Cooper, 799 F.2d 1342 (9th Cir. 1986) (Bush does not preclude Bivens claims by probationary employee whose remedies under Civil Service Reform Act are very limited). See also Doe v. Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985) (excepted service employee); Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983); McIntosh v. Weinberger, 810 F.2d 1411 (8th Cir. 1987). The rationale for these decisions was largely undercut by the Supreme Court's subsequent decision in Schweiker v. Chilicky, 487 U.S. 412 (1988). In Schweiker, the Supreme Court held that courts must give "appropriate deference to indications that congressional inaction has not been inadvertent," and should not create Bivens remedies when "design of Federal Government programs suggests that Congress has provided what it considers to be adequate remedial mechanisms for constitutional violations that may occur in course of its administration." As the Eighth Circuit noted in McIntosh following remand from the Supreme Court for consideration in light of Schweiker, Schweiker creates "a sort of presumption against judicial recognition of direct [Bivens] actions for violations of the Constitution by Federal officials or employees." McIntosh v. Turner, 861 F.2d 524, 526 (8th Cir. 1988). See also Steele v. United States, 19 F.3d 531 (10th Cir. 1994) (finding FTCA suit by former Air Force employee for "whislteblowing" was preempted by CSRA's comprehensive scheme of redress); Albright v. United States, 10 F.3d 790 (Fed. Cir. 1993); Jones v. Tennessee Valley Auth., 948 F.2d 258 (6th Cir. 1991) (holding CSRA provides comprehensive system to protect rights of employees).

CHAPTER 9

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

9.1 Substantive Law.

a. Title VII, 1964 Civil Rights Act. Before 1972 a Federal employee's only recourse for an incident of employment discrimination was to lodge an administrative complaint with the Civil Service Commission. Title VII of the Civil Rights Act of 1964 provided statutory administrative and judicial remedies for employees in the private sector, but excluded Federal employees from its coverage. The United States was not included within the definition of "employer" for purposes of the Act.

The sole administrative remedy for Federal employees before 1972 was created by Executive Order 11478. This executive order is still in effect, although it has been amended several times since it was first issued. Under the current version of this executive order, an aggrieved employee is entitled to an initial agency review of the complaint followed by a right to appeal to the Equal Employment Opportunity Commission (EEOC). The executive order outlines this remedy, highlights the Federal policy toward equal opportunity, and empowers the EEOC to issue regulations and hear complaints.

Executive Order 11478
EQUAL EMPLOYMENT OPPORTUNITY
IN THE FEDERAL GOVERNMENT

It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.

As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each

executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. . . .

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

Sec. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

. . . .

Richard Nixon

The White House
August 8, 1969

[Executive Order 11478 (8 Aug 69) as amended by Executive Orders 11590 (23 Apr 71) and 12106 (26 Dec 78).]

The original executive order and its implementing regulations created a tedious, time-consuming complaint procedure that was generally ineffective. Enforcement of equal opportunity requirements by the old Civil Service Commission was uneven, and the system was frequently said to impede rather than enhance the attainment of equal opportunity in the Federal Government. Federal employees who were dissatisfied with the resolution of their complaints had no statutory basis upon which to seek judicial review of the administrative procedure; they were also faced with insurmountable obstacles, such as sovereign immunity defenses, when they attempted to sue.

Congress remedied this in 1972 with the enactment of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, which amended numerous sections of Title VII and added Sections 717 and 718. Section 717, codified at 42 U.S.C. § 2000e-16, extended to certain Federal employees the statutory right to file civil actions alleging discrimination on the basis of race, color, religion, sex, or national origin, if resolution of their administrative complaints was unsatisfactory. Section 718 (42 U.S.C. §2000e-17) imposed the requirement on Federal contractors to have affirmative action plans. As you read the excerpt of the statute and the materials that follow, consider the extent to which the shortcomings of the old regulatory system were remedied by the statute.

42 U.S.C. § 2000e-16
Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage.

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested

parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress.

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant.

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000-5(f) through (k) of this title applicable to civil actions.

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity.

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

42 U.S.C. § 2000e-17.
Procedure for denial, withholding, termination, or suspension of Government contract subsequent to acceptance by Government of affirmative action plan of employer; time of acceptance of plan.

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by an agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve

> months without first according such employer full hearing and adjudication under the provisions of section 554 of Title 5, and the following pertinent sections: Provided, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: Provided further, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

(1) Disparate Treatment Analysis. In a disparate treatment case of employment discrimination, "[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." International Brotherhood of Teamsters v. United States, 431 U.S. 324, 334 (1977). The employee must prove the action taken was motivated by prohibited discrimination. Because there is seldom sufficient direct evidence of discrimination ("I don't like _____ class and that's why I didn't promote employee X"), the Supreme Court has developed a test for circumstantial evidence of employment discrimination cases.

Under the "shifting burdens" analysis, the employee must first establish a *prima facie* case of discrimination. The elements of this test vary, depending on the employment matter in dispute. In a job selection or promotion case, the employee must be a member of a protected class (only those matters protected by federal discrimination law); be qualified for the position involved; be passed over for selection; and someone outside the protected class is selected (treated more favorably). In other employment decisions, the final two elements are replace by the inquiry of whether the circumstances give rise to an inference of discrimination. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 420 U.S. 248 (1981); U.S. Postal Serv. v. Aikens, 460 U.S. 711 (1983); St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993); Harding v. Gray, 9 F.3d 150 (D.C. Cir. 1993).

The key to a *prima facie* case is different treatment from similarly situated employees outside the complainant's protected class. In a job application action, other applicants are similarly situated; employees seeking promotion are not. In reductions in force, employees within a competitive level and competitive area are similarly situated; employees in other competitive levels and areas are not similarly situated. *See* Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1994) (where the court misapplied the similarly situated test to find a GS09 and a GS12 were similarly situated in a RIF).

Once the employee establishes the *prima facie* case, the burden of production shifts to the agency to articulate a valid, nondiscriminatory reason for its action. The stated reason must, if true, state a valid defense to the allegations. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Burdine.

The ultimate burden of proof always remains on the plaintiff in an employment discrimination case. After the employer (agency) articulates a valid, nondiscriminatory reason

for its actions, the employee must prove that reason is mere pretext for discrimination: in other words, the employer's explanation is unworthy of belief and prohibited discrimination is the more likely reason (keeping in mind that the employee must prove discriminatory intent). St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993).

(2) Mixed Motive. When there is direct evidence of discrimination, but the employer also has an independent, valid reason for its actions, mixed motive analysis applies. Once the employee proves discrimination was "a motivating factor" in an action, the employer must prove by clear and convincing evidence it would have taken the same action even absent discrimination. 42 U.S.C. § 2000e-2(m). Fuller v. Phipps, 67 F.3D 1137 (4th Cir. 1995). The employee may still, however, receive declaratory and injunctive relief and recover attorney's fees and costs.

(3) Disparate Impact. Employment practices that are facially neutral but affect one group disproportionately are said to have a disparate impact. An employee who establishes such a practice has proven employment discrimination unless the employer can prove the practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). These cases nearly always turn on statistics. For the appropriate analysis of statistics, see Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)(reversing disparate impact finding for improper use of statistics); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988)(the appropriate analysis is comparison of the percentage of group's employees to the number of qualified applicants, not the number of the protected group in the geographic area); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Valentino v. U.S. Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985).

(4) Reprisal. An employee who either engages in protected activity under discrimination laws (files or participates in a complaint) or otherwise opposes discriminatory practices is protected by law from retaliation. An employee can prove reprisal discrimination against the employer (agency) by demonstrating a protected activity; an adverse employment action: and, a causal connection between the protected activity and the adverse action. 42 U.S.C. § 2000e-3; Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Miller v. Williams, 590 F.2d 317 (9th Cir. 1979). The causal connection can be presumed where the employee shows the employer was aware of the protected activity and the adverse action follows the protected activity closely in time. The employer can successfully defend against the allegation by proving a legitimate, non-retaliatory reason for the adverse action, Atkinson v. Bd. of Regents, 4 F.3d 984 (4th Cir. 1993); Butler v. Dep't of Agric. 826 F.2d 409 (5th Cir. 1987), or that the decision to take the adverse action was made before the protected activity. Newton v. Leggett, 7 F.3d 1042 (8th Cir. 1993). An employer who was unaware of the protected activity can not, of course, be guilty or reprisal. Jackson v. Brown, 5 F.3d 546 (10th Cir. 1993); Malarky v. Texaco, Inc., 983 F.2d 1204 (2d Cir. 1993); Acosta v. Univ. of the District of Columbia, 528 F. Supp. 1215 (D.D.C. 1981).

b. Age Discrimination in Employment Act. A prohibition against age discrimination in Federal employment was added to the equal employment opportunity requirements imposed on the Federal Government by Pub. L. No. 93-259, the Age Discrimination in Employment Act

(ADEA). As codified in 29 U.S.C. § 33a, ADEA, which became effective on 1 May 1974, incorporates procedures similar to those required by 42 U.S.C. § 2000e-16.

§ 633a. Nondiscrimination on account of age in Federal Government employment.

(a) All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. . . .

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

. . . .

[Section 631(b) referenced in the above statute reinforces the provisions of this section by reiterating that Federal employees must be at least 40 years of age in order to be covered by ADEA.]

As under Title VII, the EEOC is now authorized to enforce the age provisions "through appropriate remedies, including reinstatement or hiring of employees with or without backpay." The ADEA applies only to Federal employees and applicants who are at least 40 years old, not, as in same state laws, to employees under age 40.

Under the age discrimination provisions, a Federal employee may either file an administrative complaint of age discrimination or bypass the administrative avenues of recourse and bring a civil action directly in Federal district court for legal or equitable relief. If the employee fails to file an administrative age discrimination complaint with the EEOC, the statute requires the employee to give the EEOC at least 30 days' advance notice of intent to file the civil action. This advance notice must also be filed within 180 days after the alleged discriminatory act occurred. 29 U.S.C. § 633a(d). See Stevens v. Department of Treasury, 111 S. Ct. 1562 (1991). This 180-day provision acts like a statute of limitations on age discrimination actions.

c. Rehabilitation Act of 1973. Discrimination on the basis of physical or mental handicap was prohibited by the Rehabilitation Act of 1973, codified at 29 U.S.C. § 791. The 1978 Rehabilitation Act Amendments extended the remedies, procedures, and rights under Title VII to employees encountering discrimination based on such a handicap (29 U.S.C. § 794a). The Rehabilitation Act has been amended several time since its inception, most notably by the

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213, and the 1992 Rehabilitation Act Amendments. Extracts of the current Act are reproduced below. Note that the amended Rehabilitation Act refers to individual with a "disability." The terms "handicap" and "handicapped" are no longer used. This indicates no change in substance, only a reflection of societal use.

§ 791 Employment of handicapped individuals.

. . . .

Federal agencies; affirmative action program plans

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the [Equal Employment Opportunity] Commission and to the [Interagency] Committee [on Handicapped Employees] an affirmative action program plan for the hiring, placement, and advancement of individuals with handicaps in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees with handicaps are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with handicaps.

.....

(g) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Section 791(b) has been held to require agencies and the Civil Service Commission (now The Equal Employment Opportunity Commission) to provide opportunity for individuals to raise claims of employment discrimination based on physical or mental handicap (disability). Ryan v. Federal Deposit Insurance Corp., 565 F.2d 762 (D.C. Cir. 1977). The EEOC regulations in this area are currently codified at 29 C.F.R. Part 1614. In the 1978 amendments to the Rehabilitation Act, Congress granted aggrieved disabled employees the same procedures for processing their complaints as available to title VII complainants. The 1992 amendments require application of the substantive provisions of the Americans with Disabilities Act (subsection (g) above).

§ 794a Remedies and attorneys fees.

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C.A. § 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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(1) Reasonable Accommodation The Rehabilitation Act, *as amended,* prohibits discrimination against a qualified individual with a disability and requires employers to reasonably accommodate the qualified disabled who can perform the essential functions of a position with or without reasonable accommodation. An allegation of failure to reasonably accommodate an employee can arise in hiring, placement, or advancement opportunities. In these cases, the employee must have, have a record of, or be regarded as having a physical or mental impairment that substantially limits one or more major life activity. 29 U.S.C. §§ 706, 709; 29 C.F.R. § 1614.203; 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2; Cook v. State of Rhode Island, 10 F.3d 17 (1st Cir. 1993); Ruiz v. U.S. Postal Svc., 59 M.S.P.R. 76 (1993). The employee must be able "with or without reasonable accommodation, [to] . . . perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . ." 29 C.F.R. § 1614.203(a)(6)(1996). An impairment is--

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h)(1996). Major life activities are things like "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." C.F.R. § 1630.2(i)(1996). Employees who can not perform in only one specific job do not suffer an impairment of the major life activity of working. Heilwell v. Mount Sinai Hospital, 32 F.3d 718 (2d Cir. 1994) (asthma exacerbated only in one particular location did not constitute an impairment); Byrne v. Board of Educ., 979 F.2d 560, 565-66 (7th Cir. 1992); Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir. 1992); Maulding v. Sullivan, 961 F.2d 694, 698 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1255 (1993); Miller v. AT&T Network Sys., 915 F.2d 1404, 1404 (9th Cir. 1990) (adopting district court opinion at 722 F.Supp. 633 (D.Or. 1989)); Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989); Jasany v. United States Postal Service, 755 F.2d 1244, 1250 (6th Cir. 1985). *Contra,* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993)(finding without analysis firefighters with skin condition were limited in major life activity of working by no-beard rule).

Essential functions of a position are determined by the employer and derived from the position description and other materials. ". . .[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job." 29 U.S.C. § 12111(8)(1995). *See also* 29 C.F.R. § 1630.2(n)(1996).

> The term reasonable accommodation means--
>
> (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
> (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
> (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.
> (2) Reasonable accommodation may include but is not limited to:
> (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities
> (3) To determine appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.2(o) (1996). Closely tied to the issue of reasonable accommodation is undue hardship on the employer. An accommodation that would cause undue hardship need not be provided. *See* 29 U.S.C. § 1630.2(p) (1996). Vande Zande v. State of Wisconsin Dep't of Admin., 44 F.3d 538 (7th Cir. 1995) (finding that the financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983); Bolstein v. Dep't of Labor, 55 M.S.P.R. 459 (1992); Cohen v. Dep't of Army, 46 M.S.P.R. 369 (1990); Widger v. VA, 37 M.S.P.R. 368 (1988). An agency that attempts to reasonably accommodate an employee and fails will not be liable for compensatory damages. 42 U.S.C. § 1981a(a)(3); Hocker v. Dep't of Transp., 63 M.S.P.R. 497 (1994).

(2) Drug use. The Rehabilitation Act amendment s of 1992 excludes from the definition of a disabled individual any one who claims disability based on current use of illegal drugs. 29 U.S.C. § 706(8)(F)(iii). *See also* 42 U.S.C. § 12114(a) ("For purposes of this subchapter, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.").

9.2 Complaint Processing.

EEOC regulations implementing Title VII are currently codified at 29 C.F.R., Part 1614. Every agency is required by 29 C.F.R. § 1614.102 to include in its regulations a procedure for accepting and processing administrative discrimination complaints from employees or applicants for employment who believe they have been discriminated against because of race, color, religion, sex, or national origin. The general structure for agency complaint procedures and rights to appeal to EEOC and obtain judicial review are described in the following regulations.

The first stop in the EEOC administrative complaints process is the equal employment opportunity (EEO) counselor, who works for the agency that allegedly discriminated and performs the counseling function either full-time or as a collateral duty. Counselors normally are not attorneys, and they have widely-varying degrees of training and expertise in employment discrimination law.

The counseling process resolves most discrimination cases before a formal complaint is ever filed. The counselor meets with the complainant to explain the complaints process and identify issues; meets with witnesses and gathers information; and attempts to resolve the employment dispute at the lowest level possible. Historically about 80 percent of all disputes are resolved during the counseling process.

The complainant generally must contact an EEO counselor within 45 days of the discriminatory act or the effective date of a discriminatory personnel action. The counselor then has 30 days to complete counseling unless the complainant agrees to an extension of up to 60 days, or the agency and the individual agree to pursue an alternative dispute resolution procedure. The counselor provides the complainant a "notice of final interview" at the end of the counseling

period, following which the complainant may file a formal discrimination complaint within 15 days.

The respondent agency determines whether to accept or dismiss the complaint. It *shall* dismiss when the complaint fails to state a claim upon which relief can be granted; the complaint states a claim already pending before the EEOC, or that has already been decided by the EEOC; the complainant fails to meet the deadlines described above (counselor contact within 45 days, formal complaint within 15 days of notice of final interview); or the claim is moot or not yet ripe.

The complainant may appeal to the EEOC within 30 days of the agency's dismissal of part or all of the complaint. Any statement or brief in support of the appeal is due 30 days after filing the appeal. The respondent agency then has 30 days to forward the complaint file to the EEOC along with any agency statement or brief in opposition. The EEOC reviews the record and any supplemental information it may request from the parties, and determines whether the agency should have accepted the complaint.

The process moves to the investigation stage if the agency accepts any allegation of discrimination or loses the appeal from a dismissal. The agency investigates the complaint, developing "a complete and impartial factual record upon which to make findings on the matters raised by the written complaint." The agency must complete the investigation within 180 days from the date the complainant files the formal complaint, or from the date that the EEOC orders acceptance of the complaint, unless the parties agree to an extension of up to 90 days.

The agency forwards a copy of the completed investigation to the complainant, who then has 30 days to request either a hearing before an EEOC administrative judge or a final agency decision without a hearing. The agency head makes the decision based on the administrative record if the complainant elects a final agency decision without a hearing. The complainant then 30 days to appeal to the EEOC if the agency head finds no discrimination, or grants less than all the relief requested.

If the complainant requests a hearing, the EEOC Regional Office assigns an administrative judge who then permits discovery, holds a closed hearing, issues findings of fact and conclusions of law on the merits of the complaint, and "order[s] appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint." The administrative judge's decision, however, is merely a recommendation to the agency. The agency head has 60 days to issue a final agency decision adopting, rejecting, or modifying the administrative judge's decision. A disappointed complainant may appeal the final agency decision to the EEOC.

The actual regulation is set out below.

§29 C.F.R. § 1614.105. Pre-complaint processing.

(a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.

(1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of a personnel action, within 45 days of the effective date of the action.

(2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

(b) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing after an investigation by the agency, election rights pursuant to § 1614.301 and § 1614.302, the right to file a notice of intent to sue pursuant to § 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in pre-complaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.

(c) Counselors shall conduct counseling activities in accordance with instructions contained in Commission Management Directives. When advised that a complaint has been filed by an aggrieved person, the Counselor shall submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling.

(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the agency has an established dispute resolution procedure under paragraph (f) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person brought the matter to the Counselor's attention. If the matter has not been resolved, the aggrieved person shall be informed in

writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

(e) Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

(f) Where the agency has an established dispute resolution procedure and the aggrieved individual agrees to participate in the procedure, the pre-complaint processing period shall be 90 days. If the matter has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

(g) The Counselor shall not attempt in any way to restrain the aggrieved person from filing a complaint. The Counselor shall not reveal the identity of an aggrieved person who consulted the Counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint under this part from that person involving that same matter.

29 C.F.R. § 1614.106. Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice required by § 1614.105(d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

(d) The agency shall acknowledge receipt of a complaint in writing and inform the complainant of the date on which the complaint was filed. Such acknowledgment shall also advise the complainant that:

(1) The complainant has the right to appeal the final decision or dismissal of all or a portion of a complaint; and

(2) The agency is required to conduct a complete and fair investigation of the complaint within 180 days of the filing of the complaint unless the parties agree in writing to extend that period.

29 C.F.R. § 1614.107. Dismissals of complaints.

The agency shall dismiss a complaint or a portion of a complaint:

(a) That fails to state a claim under § 1614.103 or § 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;

(b) That fails to comply with the applicable time limits contained in §§ 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with § 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;

(c) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;

(d) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and § 1614.301 or § 1614.302 indicates that the complainant has elected to pursue the non-EEO process;

(e) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory;

(f) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;

(g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available; or

(h) If, prior to the issuance of the notice required by § 1614.108(f), the complainant refuses within 30 days of receipt of an offer of settlement to accept an agency offer of full relief containing a certification from the agency's EEO Director, Chief Legal Officer or a designee reporting directly to the EEO Director or the Chief Legal Officer that the offer constitutes full relief, provided that the offer gave notice that failure to accept would result in dismissal of the complaint. An offer of full relief under this subsection is the appropriate relief in § 1614.501.

29 C.F.R. § 1614.108. Investigation of complaints.

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c)(1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to § 1614.107. By written agreement within those time periods, the

complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to § 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

29 C.F.R. § 1614.109. Hearings.

(a) When a complainant requests a hearing, the agency shall request that the Commission appoint an administrative judge to conduct a hearing in accordance with this section. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances. Where the administrative judge determines that the complainant is raising or intends to pursue issues like or related to those raised in the complaint, but which the agency has not had an opportunity to address, the administrative judge shall remand any such issue for counseling in accordance with ' 1614.105 and for such other processing as ordered by the administrative judge.

(b) Discovery. The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(c) Conduct of hearing. Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the

administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(d) The procedures in paragraphs (d)(1) through (3) of this section apply to hearings of complaints:

(1) The complainant, an agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as appropriate.

(e) Findings and conclusions without hearing. (1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to

any such material fact. The party shall serve the statement on the opposing party.

(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue findings and conclusions without a hearing or make such other ruling as is appropriate.

(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue findings and conclusions without holding a hearing.

(f) Record of hearing. The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(g) Findings and conclusions. Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing findings of fact and conclusions of law, within 180 days of a request for a hearing being received by EEOC, an administrative judge shall issue findings of fact and conclusions of law on the merits of the complaint, and shall order appropriate relief where discrimination is found with regard to the matter that gave rise to the complaint. The administrative judge shall send copies of the entire record, including the transcript, and the findings and conclusions to the parties by certified mail, return receipt requested. Within 60 days of receipt of the findings and conclusions, the agency may reject or modify the findings and conclusions or the relief ordered by the administrative judge and issue a final decision in accordance with § 1614.110. If an agency does not, within 60 days of receipt, reject or modify the findings and conclusions of the administrative judge, then the findings and conclusions of the administrative judge and the relief ordered shall become the final decision of the agency and the agency shall notify the complainant of the final decision in accordance with § 1614.110.

29 C.F.R. § 1614.110. Final decisions.

Within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision, or within 60 days of receiving the findings and conclusions of an administrative judge, the agency shall issue a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The final decision shall contain notice of the right to appeal to the Commission, the name and address of the agency official upon whom an appeal should be served, notice of the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the decision.

29 C.F.R. § 1614.201. Age Discrimination in Employment Act.

(a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal Sector Programs, 1801 L St., N.W., Washington, D.C. 20507 within 180 days of the occurrence of the alleged unlawful practice.

(b) The Commission may exempt a position from the provisions of the ADEA if the Commission establishes a maximum age requirement for the position on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

(c) When an individual has filed an administrative complaint alleging age discrimination that is not a mixed case, administrative remedies will be considered to be exhausted for purposes of filing a civil action:

(1) 180 days after the filing of an individual complaint if the agency has not issued a final decision and the individual has not filed an appeal or 180 days after the filing of a class complaint if the agency has not issued a final decision;

(2) After the issuance of a final decision on an individual or class complaint if the individual has not filed an appeal; or

(3) After the issuance of a final decision by the Commission on an appeal or 180 days after the filing of an appeal if the Commission has not issued a final decision.

29 C.F.R. § 1614.202. Equal Pay Act.

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The Commission will provide notice to the agency that it will be initiating an investigation.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part.

29 C.F.R. § 1614.203. Rehabilitation Act.

(a) Definitions.

(1) Individual with handicap(s) is defined for this section as one who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(ii) Has a record of such an impairment, or

(iii) Is regarded as having such an impairment.

(2) Physical or mental impairment means:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, respiratory, genito-urinary, hemic and lymphatic, skin, and endocrine, or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(3) Major life activities means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) Has a record of such an impairment means has a history of, or has been classified (or misclassified) as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) Is regarded as having such an impairment means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of an employer toward such impairment; or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

(6) Qualified individual with handicaps means with respect to employment, an individual with handicaps who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(i) Meets all of the experience or education requirements (which may include passing a written test) of the position in question, or

(ii) Meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

(b) The Federal Government shall become a model employer of individuals with handicaps. Agencies shall give full consideration to the hiring, placement, and advancement of qualified individuals with mental and physical handicaps. An agency shall not discriminate against a qualified individual with physical or mental handicaps.

(c) Reasonable accommodation.

(1) An agency shall make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified individual with handicaps unless the agency can demonstrate that the accommodation would impose an undue hardship on the operations of its program.

(2) Reasonable accommodation may include, but shall not be limited to:

(i) Making facilities readily accessible to and usable by individuals with handicaps, and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.

(3) In determining whether, pursuant to paragraph (c)(1) of this section, an accommodation would impose an undue hardship on the operation of the agency in question, factors to be considered include:

(i) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;

(ii) The type of agency operation, including the composition and structure of the agency's work force; and

(iii) The nature and the cost of the accommodation.

(d) Employment criteria. (1) An agency may not make use of any employment test or other selection criterion that screens out or tends to screen out qualified individuals with handicaps or any class of individuals with handicaps unless:

(i) The agency demonstrates that the test score or other selection criterion is job-related for the position in question and consistent with business necessity, and

(ii) OPM or other examining authority shows that job-related alternative tests, or the agency shows that job-related alternative criteria, that do not screen out or tend to screen out as many individuals with handicaps are unavailable.

(2) An agency shall select and administer tests concerning employment so as to insure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills,

the test results accurately reflect the applicant's or employee's ability to perform the position or type of positions in question rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skill (except where those skills are the factors that the test purports to measure).

(e) Preemployment inquiries. (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualification requirements if applicable, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question. The Office of Personnel Management may also make an inquiry as to the nature and extent of a handicap for the purpose of special testing.

(2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that: all entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and the results of such an examination are used only in accordance with the requirements of this part. Nothing in this section shall be construed to prohibit the gathering of preemployment medical information for the purposes of special appointing authorities for individuals with handicaps.

(3) To enable and evaluate affirmative action to hire, place or advance individuals with handicaps, the agency may invite applicants for employment to indicate whether and to what extent they are handicapped, if:

(i) The agency states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used, that the information requested is intended for use solely in conjunction with affirmative action, and

(ii) The agency states clearly that the information is being requested on a voluntary basis, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be kept confidential except that:

(i) Managers, selecting officials, and others involved in the selection process or responsible for affirmative action may be informed that an applicant is eligible under special appointing authority for the disabled;

(ii) Supervisors and managers may be informed regarding necessary accommodations;

(iii) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment;

(iv) Government officials investigating compliance with laws, regulations, and instructions relevant to equal employment opportunity and affirmative action for individuals with handicaps shall be provided information upon request; and

(v) Statistics generated from information obtained may be used to manage, evaluate, and report on equal employment opportunity and affirmative action programs.

(f) Physical access to buildings.

(1) An agency shall not discriminate against applicants or employees who are qualified individuals with handicaps due to the inaccessibility of its facility.

(2) For the purpose of this subpart, a facility shall be deemed accessible if it is in compliance with the Architectural Barriers Act of 1968 and the Americans with Disabilities Act of 1990.

(g) Reassignment. When a nonprobationary employee becomes unable to perform the essential functions of his or her position even with reasonable accommodation due to a handicap, an agency shall offer to reassign the individual to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the individual would be able to perform with reasonable accommodation if necessary unless the agency can demonstrate that the reassignment would impose an undue hardship on the operation of its program. In the absence of a position at the same grade or level, an offer of reassignment to a vacant position at the highest available grade or level below the employee's current grade or level shall be required, but availability of such a vacancy shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. § 8337 or 5 U.S.C. § 8451. If the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the nonprobationary employee is unable to perform the essential functions of his or her position even with reasonable accommodation, then the agency does not have an obligation under this section to offer to reassign the individual to that position, but the agency must consider the individual on an equal basis with those who applied for the position. For the purpose of this paragraph, an employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any applicable collective bargaining agreement.

(h) Exclusion from Definition of Individual(s) with Handicap(s). The term "individual with handicap(s)" shall not include an individual who is currently engaging in the illegal use of drugs, when an agency acts on the basis of such use. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, but

does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of federal law. This exclusion, however, does not exclude an individual with handicaps who:

(i) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(iii) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(2) Except that it shall not violate this section for an agency to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (h)(1)(i) and (ii) of this section is no longer engaging in the illegal use of drugs.

29 C.F.R. § 1614.204. Class complaints.

(a) Definitions.

(1) A "class" is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age or handicap.

(2) A "class complaint" is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An "agent of the class" is a class member who acts for the class during the processing of the class complaint.

(b) Pre-complaint processing. An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105.

(c) Filing and presentation of a class complaint.

(1) A class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) Acceptance or dismissal.

(1) Within 30 days of an agency's receipt of a complaint, the agency shall:

(i) Designate an agency representative who shall not be any of the individuals referenced in § 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

(2) The administrative judge may recommend that the agency dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2).

(3) If an allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall recommend that the agency dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the agency for further counseling of the agent. After counseling, the allegation shall be consolidated with the class complaint.

(4) If an allegation lacks specificity and detail, the administrative judge shall afford the agent 15 days to provide specific and detailed information. The administrative judge shall recommend that the agency dismiss the complaint if the agent fails to provide such information within the specified time period. If the information provided contains new allegations outside the scope of the complaint, the administrative judge shall advise the agent how to proceed on an individual or class basis concerning these allegations.

(5) The administrative judge shall recommend that the agency extend the time limits for filing a complaint and for consulting with a Counselor in accordance with the time limit extension provisions contained in §§ 1614.105(a)(2) and 1614.604.

(6) When appropriate, the administrative judge may recommend that a class be divided into subclasses and that each subclass be treated as a class, and the provisions of this section then shall be construed and applied accordingly.

(7) The administrative judge's written recommendation to the agency on whether to accept or dismiss a complaint and the complaint file shall be transmitted to the agency and notification of that transmittal shall be sent to the agent. The administrative judge's recommendation to accept or dismiss shall become the agency decision unless the agency accepts, rejects or modifies the recommended decision within 30 days of the receipt of the recommended decision and complaint file. The agency shall notify the agent by certified mail, return receipt requested, and the administrative judge of its decision to accept or dismiss a complaint. At the same time, the agency shall forward to the agent copies of the administrative judge's recommendation and the complaint file. The dismissal of a class complaint shall inform the agent either that the complaint is being filed on that date as an individual complaint of discrimination and will be processed under subpart A or that the complaint is also dismissed as an individual complaint in accordance with § 1614.107. In addition, it shall inform the agent of the right to appeal the dismissal of the class complaint to the Office of Federal Operations or to file a civil action and include EEOC Form 573, Notice Of Appeal/Petition.

(e) Notification.

(1) Within 15 days of accepting a class complaint, the agency shall use reasonable means, such as delivery, mailing to last known address or distribution, to notify all class members of the acceptance of the class complaint.

(2) Such notice shall contain:

(i) The name of the agency or organizational segment, its location, and the date of acceptance of the complaint;

(ii) A description of the issues accepted as part of the class complaint;

(iii) An explanation of the binding nature of the final decision or resolution of the complaint on class members; and

(iv) The name, address and telephone number of the class representative.

(f) Obtaining evidence concerning the complaint.

(1) The administrative judge shall notify the agent and the agency representative of the time period that will be allowed both parties to prepare their cases. This time period will include at least 60 days and may be extended by the administrative judge upon the request of either party. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(2) If mutual cooperation fails, either party may request the administrative judge to rule on a request to develop evidence. If a party fails without good cause shown to respond fully and in timely fashion to a request made or approved by the administrative judge for documents, records,

comparative data, statistics or affidavits, and the information is solely in the control of one party, such failure may, in appropriate circumstances, cause the administrative judge:

(i) to draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(ii) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(iii) To exclude other evidence offered by the party failing to produce the requested information;

(iv) To recommend that a decision be entered in favor of the opposing party; or

(v) To take such other actions as the administrative judge deems appropriate.

(3) During the period for development of evidence, the administrative judge may, in his or her discretion, direct that an investigation of facts relevant to the complaint or any portion be conducted by an agency certified by the Commission.

(4) Both parties shall furnish to the administrative judge copies of all materials that they wish to be examined and such other material as may be requested.

(g) Opportunity for resolution of the complaint.

(1) The administrative judge shall furnish the agent and the representative of the agency a copy of all materials obtained concerning the complaint and provide opportunity for the agent to discuss materials with the agency representative and attempt resolution of the complaint.

(2) The complaint may be resolved by agreement of the agency and the agent at any time as long as the agreement is fair and reasonable.

(3) If the complaint is resolved, the terms of the resolution shall be reduced to writing and signed by the agent and the agency.

(4) Notice of the resolution shall be given to all class members in the same manner as notification of the acceptance of the class complaint and shall state the relief, if any, to be granted by the agency. A resolution shall bind all members of the class. Within 30 days of the date of the notice of resolution, any member of the class may petition the EEO Director to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. Such a petition will be processed in accordance with § 1614.204(d) and if the administrative judge finds that the resolution is not fair and reasonable, he or she shall recommend that the resolution be vacated and that the original class agent be replaced by the petitioner or some other class member who is eligible to be the class agent during further processing of the class complaint. An agency's decision that the resolution is not fair and reasonable vacates any agreement between the former class agent and the agency. An agency decision on such a petition shall inform the former class agent or the petitioner of the right to appeal the decision to the

Office of Federal Operations and include EEOC Form 573, Notice Of Appeal/Petition.

(h) Hearing. On expiration of the period allowed for preparation of the case, the administrative judge shall set a date for hearing. The hearing shall be conducted in accordance with 29 C.F.R. 1614.109(a) through (f).

(i) Report of findings and recommendations.

(1) The administrative judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class and any individual relief, where appropriate, with regard to the personnel action or matter that gave rise to the complaint.

(2) If the administrative judge finds no class relief appropriate, he or she shall determine if a finding of individual discrimination is warranted and, if so, shall recommend appropriate relief.

(3) The administrative judge shall notify the agent of the date on which the report of findings and recommendations was forwarded to the agency.

(j) Agency decision.

(1) Within 60 days of receipt of the report of findings and recommendations issued under § 1614.204(i), the agency shall issue a final decision, which shall accept, reject, or modify the findings and recommendations of the administrative judge.

(2) The final decision of the agency shall be in writing and shall be transmitted to the agent by certified mail, return receipt requested, along with a copy of the report of findings and recommendations of the administrative judge.

(3) When the agency's final decision is to reject or modify the findings and recommendations of the administrative judge, the decision shall contain specific reasons for the agency's action.

(4) If the agency has not issued a final decision within 60 days of its receipt of the administrative judge's report of findings and recommendations, those findings and recommendations shall become the final decision. The agency shall transmit the final decision to the agent within five days of the expiration of the 60-day period.

(5) The final decision of the agency shall require any relief authorized by law and determined to be necessary or desirable to resolve the issue of discrimination.

(6) A final decision on a class complaint shall, subject to subpart D, be binding on all members of the class and the agency.

(7) The final decision shall inform the agent of the right to appeal or to file a civil action in accordance with subpart D and of the applicable time limits.

(k) Notification of decision. The agency shall notify class members of the final decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class

members to seek individual relief, and of the procedures to be followed. Notice shall be given by the agency within 10 days of the transmittal of its final decision to the agent.

(l) Relief for individual class members.

(1) When discrimination is found, an agency must eliminate or modify the employment policy or practice out of which the complaint arose and provide individual relief, including an award of attorney's fees and costs, to the agent in accordance with § 1614.501.

(2) When class-wide discrimination is not found, but it is found that the class agent is a victim of discrimination, § 1614.501 shall apply. The agency shall also, within 60 days of the issuance of the final decision finding no class-wide discrimination, issue the acknowledgment of receipt of an individual complaint as required by § 1614.106(d) and process in accordance with the provisions of subpart A, each individual complaint that was subsumed into the class complaint.

(3) When discrimination is found in the final decision and a class member believes that he or she is entitled to individual relief, the class member may file a written claim with the head of the agency or its EEO Director within 30 days of receipt of notification by the agency of its final decision. The claim must include a specific, detailed showing that the claimant is a class member who was affected by a personnel action or matter resulting from the discriminatory policy or practice, and that this discriminatory action took place within the period of time for which the agency found class-wide discrimination in its final decision. The period of time for which the agency finds class-wide discrimination shall begin not more than 45 days prior to the agent's initial contact with the Counselor and shall end not later than the date when the agency eliminates the policy or practice found to be discriminatory in the final agency decision. The agency shall issue a final decision on each such claim within 90 days of filing. Such decision must include a notice of the right to file an appeal or a civil action in accordance with subpart D and the applicable time limits.

29 C.F.R. § 1614.301. Relationship to negotiated grievance procedure.

(a) When a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same matter. An election to proceed under a negotiated grievance procedure is

indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same matter under part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The dismissal of such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.

(b) When a person is not covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part.

(c) When a person is employed by an agency not subject to 5 U.S.C. § 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

29 C.F.R. § 1614.401. Appeals to the Commission.

(a) A complainant may appeal an agency's final decision, or the agency's dismissal of all or a portion of a complaint.

(b) An agent may appeal the agency decision accepting or dismissing all or a portion of a class complaint, or a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and both may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(c) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. § 7121(d) is inapplicable to the involved agency.

(d) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with § 1614.504.

29 C.F.R. § 1614.402. Time for appeals to the Commission.

(a) Except for mixed case complaints, any dismissal of a complaint or a portion of a complaint or any final decision may be appealed to the Commission within 30 days of the complainant's receipt of the dismissal or final decision. Any grievance decision may be appealed within 30 days of receipt of a decision referred to in § 1614.401(c). In the case of class complaints, any final decision received by an agent, petitioner or an individual claimant may be appealed to the Commission within 30 days of its receipt. Where a complainant has notified the EEO Director of alleged noncompliance with a settlement agreement in accordance with § 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but must file an appeal within 30 days of receipt of an agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) above within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

29 C.F.R. § 1614.403. How to appeal.

(a) The complainant, agent, grievant or individual class claimant (hereinafter complainant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P. O. Box 19848, Washington, D.C. 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition, and should indicate what he or she is appealing.

(b) The complainant shall furnish a copy of the appeal to the agency's EEO Director (or whomever is designated by the agency in the dismissal or decision) at the same time that he or she files the appeal with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made on the agency.

(c) If a complainant does not file an appeal within the time limits of this subpart, the appeal will be untimely and shall be dismissed by the Commission.

(d) Any statement or brief in support of the appeal must be submitted to the Director, Office of Federal Operations, and to the agency within 30 days of filing the appeal. Following receipt of the appeal and any brief in support of the appeal, the Director, Office of Federal Operation, will request the complaint file from the agency. The agency must submit the complaint file and any agency statement or brief in opposition to the appeal to the Director, Office of Federal Operations, within 30 days of receipt of the Commission's request for the complaint file, which has been made by certified mail. A copy of the agency's statement or brief must be served on the complainant at the same time.

29 C.F.R. § 1614.404. Appellate procedure.

(a) On behalf of the Commission, the Office of Federal Operations shall review the complaint file and all written statements and briefs from either party. The Commission may supplement the record by an exchange of letters or memoranda, investigation, remand to the agency or other procedures.

(b) If the Office of Federal Operations requests information from one or both of the parties to supplement the record, each party providing information shall send a copy of the information to the other party.

29 C.F.R. § 1614.405. Decisions on appeals.

(a) The Office of Federal Operations, on behalf of the Commission, shall issue a written decision setting forth its reasons for the decision. The Commission shall dismiss appeals in accordance with §§ 1614.107, 1614.403(c) and 1614.410. The decision shall be based on the preponderance of the evidence. If the decision contains a finding of discrimination, appropriate remedy(ies) shall be included and, where appropriate, the entitlement to interest, attorney's fees or costs shall be indicated. The decision shall reflect the date of its issuance, inform the complainant of his or her civil action rights, and be transmitted to the complainant and the agency by certified mail, return receipt requested.

(b) A decision issued under paragraph (a) of this section is final within the meaning of § 1614.408 unless:

(1) Either party files a timely request for reconsideration pursuant to § 1614.407; or

(2) The Commission on its own motion reconsiders the case.

29 C.F.R. § 1614.407. Reconsideration.

(a) Within a reasonable period of time, the Commission may, in its discretion, reconsider any decision of the Commission issued under § 1614.405(a) notwithstanding any other provisions of this part.

(b) A party may request reconsideration of any decision issued under § 1614.405(a) provided that such request is made within 30 days of receipt of a decision of the Commission or within 20 days of receipt of another party's timely request for reconsideration. Such request, along with any supporting statement or brief, shall be submitted to the Office of Review and Appeals and to all parties with proof of such submission. All other parties shall have 20 days from the date of service in which to submit to all other parties, with proof of submission, any statement or brief in opposition to the request.

(c) The request or the statement or brief in support of the request shall contain arguments or evidence which tend to establish that:

(1) New and material evidence is available that was not readily available when the previous decision was issued; or

(2) The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

(3) The decision is of such exceptional nature as to have substantial precedential implications.

(d) A decision on a request for reconsideration by either party is final and there is no further right by either party to request reconsideration of the decision for which reconsideration was sought.

29 C.F.R. § 1614.408. Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act.

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under Title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final decision on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final decision has not been issued;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

29 C.F.R. § 1614.409. Civil action: Equal Pay Act.

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. § 216(b)) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

29 C.F.R. § 1614.410. Effect of filing a civil action.

Filing a civil action under § 1614.408 or § 1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

29 C.F.R. § 1614.501. Remedies and relief.

(a) When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief, as explained in appendix A of part 1613 of this chapter, which shall include the following elements in appropriate circumstances:

(1) Notification to all employees of the agency in the affected facility of their right to be free of unlawful discrimination and assurance that the particular types of discrimination found will not recur;

(2) Commitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur;

(3) An unconditional offer to each identified victim of discrimination of placement in the position the person would have occupied but for the discrimination suffered by that person, or a substantially equivalent position;

(4) Payment to each identified victim of discrimination on a make whole basis for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) Commitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case.

(b) Relief for an applicant. (1) (i) When an agency, or the Commission, finds that an applicant for employment has been discriminated against, the agency shall offer the applicant the position that the applicant would have occupied absent discrimination or, if justified by the circumstances, a substantially equivalent position unless clear and convincing evidence indicates that the applicant would not have been selected even absent the discrimination. The offer shall be made in writing. The individual shall have 15 days from receipt of the offer within which to accept or decline the offer. Failure to accept the offer within the 15-day period will be considered a declination of the offer, unless the individual can show that circumstances beyond his or her control prevented a response within the time limit.

(ii) If the offer is accepted, appointment shall be retroactive to the date the applicant would have been hired. Back pay, computed in the manner prescribed by 5 C.F.R. § 550.805, shall be awarded from the date the individual would have entered on duty until the date the individual actually enters on duty unless clear and convincing evidence

indicates that the applicant would not have been selected even absent discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The individual shall be deemed to have performed service for the agency during this period for all purposes except for meeting service requirements for completion of a required probationary or trial period.

(iii) If the offer of employment is declined, the agency shall award the individual a sum equal to the back pay he or she would have received, computed in the manner prescribed by 5 C.F.R. § 550.805, from the date he or she would have been appointed until the date the offer was declined, subject to the limitation of paragraph (b)(3) of this section. Interest on back pay shall be included in the back pay computation. The agency shall inform the applicant, in its offer of employment, of the right to this award in the event the offer is declined.

(2) When an agency, or the Commission, finds that discrimination existed at the time the applicant was considered for employment but also finds by clear and convincing evidence that the applicant would not have been hired even absent discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure it does not recur.

(3) Back pay under this paragraph (b) for complaints under title VII or the Rehabilitation Act may not extend from a date earlier than two years prior to the date on which the complaint was initially filed by the applicant.

(c) Relief for an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement, with back pay computed in the manner prescribed by 5 C.F.R. § 550.805, unless clear and convincing evidence contained in the record demonstrates that the personnel action would have been taken even absent the discrimination. Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived. The back pay liability under title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.

(2) If clear and convincing evidence indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

(d) The agency has the burden of proving by a preponderance of the evidence that the complainant has failed to mitigate his or her damages.

(e) Attorney's fees or costs.

(1) Awards of attorney's fees or costs. The provisions of this paragraph relating to the award of attorney's fees or costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. In a notice of final action or a decision, the agency or Commission may award the applicant or employee reasonable attorney's fees or costs (including expert witness fees) incurred in the processing of the complaint.

(i) A finding of discrimination raises a presumption of entitlement to an award of attorney's fees.

(ii) Any award of attorney's fees or costs shall be paid by the agency.

(iii) Attorney's fees are allowable only for the services of members of the Bar and law clerks, paralegals or law students under the supervision of members of the Bar, except that no award is allowable for the services of any employee of the Federal Government.

(iv) Attorney's fees shall be paid only for services performed after the filing of a written complaint and after the complainant has notified the agency that he or she is represented by an attorney, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. Written submissions to the agency that are signed by the representative shall be deemed to constitute notice of representation.

(2) Amount of awards.

(i) When the agency or the Commission awards attorney's fees or costs, the complainant's attorney shall submit a verified statement of costs and attorney's fees (including expert witness fees), as appropriate, to the agency within 30 days of receipt of the decision unless a request for reconsideration is filed. A statement of attorney's fees shall be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services and both the verified statement and the accompanying affidavit shall be made a part of the complaint file. The amount of attorney's fees or costs to be awarded the complainant shall be determined by agreement between the complainant, the complainant's representative and the agency. Such agreement shall immediately be reduced to writing.

(ii) (A) If the complainant, the representative and the agency cannot reach an agreement on the amount of attorney's fees or costs within 20 days of the agency's receipt of the verified statement and accompanying affidavit, the agency shall issue a decision determining the amount of attorney's fees or costs due within 30 days of receipt of the statement and affidavit. The decision shall include a notice of right to appeal to the EEOC along with EEOC Form 573, Notice Of Appeal/Petition and shall include the specific reasons for determining the amount of the award.

(B) The amount of attorney's fees shall be calculated in accordance with existing case law using the following standards:

The starting point shall be the number of hours reasonably expended multiplied by a reasonable hourly rate. This amount may be reduced or increased in consideration of the following factors, although ordinarily many of these factors are subsumed within the calculation set forth in this paragraph (e)(2)(ii)(B): The time and labor required, the novelty and difficulty of the questions, the skill requisite to perform the legal service properly, the attorney's preclusion from other employment due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation, and ability of the attorney, the undesirability of the case, the nature and length of the professional relationship with the client, and the awards in similar cases. Only in cases of exceptional success should any of these factors be used to enhance an award computed by the formula set forth in this paragraph (e)(2)(ii)(B).

(C) The costs that may be awarded are those authorized by 28 U.S.C. 1920 to include: Fees of the reporter for all or any of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; and fees for exemplification and copies of papers necessarily obtained for use in the case.

(iii) Witness fees shall be awarded in accordance with the provisions of 28 U.S.C. § 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness.

29 C.F.R. § 1614.502. Compliance with final Commission decisions.

(a) Relief ordered in a final decision on appeal to the Commission is mandatory and binding on the agency except as provided in ' 1614.405(b). Failure to implement ordered relief shall be subject to judicial enforcement as specified in § 1614.503(g).

(b) Notwithstanding paragraph (a) of this section, when the agency requests reconsideration, when the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision recommends retroactive restoration, the agency shall comply with the decision only to the extent of the temporary or conditional restoration of the employee to duty status in the position recommended by the Commission, pending the outcome of the agency request for reconsideration.

(1) Service under the temporary or conditional restoration provisions of this paragraph shall be credited toward the completion of a probationary or trial period, eligibility for a within-grade increase, or the completion of the service requirement for career tenure, if the Commission upholds its decision after reconsideration.

(2) The agency shall notify the Commission and the employee in writing, at the same time it requests reconsideration, that the relief it provides is temporary or conditional.

(c) When no request for reconsideration is filed or when a request for reconsideration is denied, the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief. The relief shall be provided in full not later than 60 days after receipt of the final decision unless otherwise ordered in the decision.

29 C.F.R. § 1614.503. Enforcement of final Commission decisions.

(a) Petition for enforcement. A complainant may petition the Commission for enforcement of a decision issued under the Commission's appellate jurisdiction. The petition shall be submitted to the Office of Federal Operations. The petition shall specifically set forth the reasons that lead the complainant to believe that the agency is not complying with the decision.

(b) Compliance. On behalf of the Commission, the Office of Federal Operations shall take all necessary action to ascertain whether the agency is implementing the decision of the Commission. If the agency is found not to be in compliance with the decision, efforts shall be undertaken to obtain compliance.

(c) Clarification. On behalf of the Commission, the Office of Federal Operations may, on its own motion or in response to a petition for enforcement or in connection with a timely request for reconsideration, issue a clarification of a prior decision. A clarification cannot change the result of a prior decision or enlarge or diminish the relief ordered but may further explain the meaning or intent of the prior decision.

(d) Referral to the Commission. Where the Director, Office of Federal Operations, is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission, or, as directed by the Commission, refer the matter to another appropriate agency.

(e) Commission notice to show cause. The Commission may issue a notice to the head of any federal agency that has failed to comply with a decision to show cause why there is noncompliance. Such notice may request the head of the agency or a representative to appear before the Commission or to respond to the notice in writing with adequate evidence of compliance or with compelling reasons for non-compliance.

(f) Certification to the Office of Special Counsel. Where appropriate and pursuant to the terms of a memorandum of understanding, the Commission may refer the matter to the Office of Special Counsel for enforcement action.

(g) Notification to complainant of completion of administrative efforts. Where the Commission has determined that an agency is not complying with a prior decision, or where an agency has failed or refused to submit any required report of compliance, the Commission shall notify the complainant of the right to file a civil action for enforcement of the decision pursuant to Title VII, the ADEA, the Equal Pay Act or the Rehabilitation Act and to seek judicial review of the agency's refusal to implement the ordered

relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and the mandamus statute, 28 U.S.C. § 1361, or to commence de novo proceedings pursuant to the appropriate statutes.

29 C.F.R. § 1614.504. Compliance with settlement agreements and final decisions.

(a) Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties. A final decision that has not been the subject of an appeal or civil action shall be binding on the agency. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased.

(b) The agency shall resolve the matter and respond to the complainant, in writing. If the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement or final decision. The complainant may file such an appeal 35 days after he or she has served the agency with the allegations of noncompliance, but must file an appeal within 30 days of his or her receipt of an agency's determination. The complainant must serve a copy of the appeal on the agency and the agency may submit a response to the Commission within 30 days of receiving notice of the appeal.

(c) Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it deems necessary or may direct that an investigation or hearing on the matter be conducted. If the Commission determines that the agency is not in compliance and the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the complaint be reinstated for further processing from the point processing ceased. Allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints under § 1614.106 or § 1614.204, as appropriate, rather than under this section.

29 C.F.R. § 1614.603. Voluntary settlement attempts.

Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved.

29 C.F.R. § 1614.604. Filing and computation of time.

(a) All time periods in this part that are stated in terms of days are calendar days unless otherwise stated.

(b) A document shall be deemed timely if it is delivered in person or postmarked before the expiration of the applicable filing period, or, in the absence of a legible postmark; if it is received by mail within five days of the expiration of the applicable filing period.

(c) The time limits in this part are subject to waiver, estoppel and equitable tolling.

(d) The first day counted shall be the day after the event from which the time period begins to run and the last day of the period shall be included, unless it falls on a Saturday, Sunday or Federal holiday, in which case the period shall be extended to include the next business day.

29 C.F.R. § 1614.605. Representation and official time.

(a) At any stage in the processing of a complaint, including the counseling stage under § 1614.105, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and to respond to agency and EEOC requests for information. If the complainant is an employee of the agency and he designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(c) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative.

(d) Unless the complainant states otherwise in writing, after the agency has received written notice of the name, address and telephone number of a representative for the complainant, all official correspondence shall be with the representative with copies to the complainant. When the complainant designates an attorney as representative, service of documents and decisions on the complainant shall be made on the attorney and not on the complainant, and time frames for receipt of materials by the complainant shall be computed from the time of receipt by the attorney. The complainant must serve all official correspondence on the designated representative of the agency.

(e) The Complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.

(f) Witnesses who are federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

29 C.F.R. § 1614.606. Joint processing and consolidation of complaints.

Complaints of discrimination filed by two or more complainants consisting of substantially similar allegations of discrimination or relating to the same matter, or two or more complaints of discrimination from the same complainant, may be consolidated by the agency or the Commission for joint processing after appropriate notification to the parties. The date of the first filed complaint controls the applicable timeframes under subpart A of this part.

29 C.F.R. § 1614.607. Delegation of authority.

An agency head may delegate authority under this part, to one or more designees.

The following chart illustrates how the individual complaint system currently works.

INFORMAL STAGE

Alleged discrimination event, effective date of alleged discriminatory personnel action, or date the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action.

↓

Contact EEO Counselor Within 45 days

↓

Final Interview Within 30 days of Contact

↓

FORMAL STAGE

Formal Complaint Filed Within 15 days of Final Interview

Reject or Cancel Following Acceptance

↓

Appeal to EEOC Within 30 days

↓

Request to Reopen Within 30 days

↓

Civil Action Within 90 days

Accepted

↓

Investigation Within 180 days

Request a Final Agency Decision Within 60 days

Request a Hearing Within 180 days

↓

Final Agency Decision Within 60days

Complainant Satisfied

Complainant Not Satisfied

↓

Appeal to EEOC Within 30 days

↓

Request to Reopen Within 30 days

↓

Civil Action Within 90 days

The EEOC has also published in 29 C.F.R. § 1614.204, special procedures for processing administrative class complaints of discrimination. These regulations are considerably more complex than those pertaining to individual complaints. For example, the EEOC, not the agency, makes the initial determination under the class complaint procedure of whether a class complaint may be maintained by the person initiating the complaint. This involves an evaluation of the complaint to see if the tests of numerosity, typicality, commonality, and adequate representation are met so that the interests of the class will be adequately protected and fairly represented.

In contrast to an individual complaint, however, a class complaint may be initiated up to 90 days after the alleged incident of discrimination occurred. The general outline of the proceedings is then the same as those used in individual complaints: informal counseling, final interview, formal complaint, investigation, attempt at informal resolution, appeal to the Office of Federal Operations of the EEOC, and finally civil suit. Whether an individual or a class complaint is initiated, the complainant must be personally aggrieved by the personnel action that is the substance of the complaint to have "standing" to complain. Under current regulations, there is no provision for a third party complaint. The former third party procedure was eliminated when the class complaint regulations were published.

Since the implementation of administrative class procedures, courts have generally required exhaustion of the administrative class requirements before filing a judicial class complaint. See McIntosh v. Weinberger, 810 F.2d 1411, 1423-25 (8th Cir. 1987); Wade v. Secretary of Army, 796 F.2d 1369, 1373 (11th Cir. 1986).

9.3 Mixed Cases. The procedures discussed in sections 9.1 and 9.2 are applicable to discrimination cases that contain no issue appealable to the Merit Systems Protection Board. A "mixed case" is one based on an action that is appealable to the MSPB and includes an allegation of discrimination.

a. Statutory Basis. Congress developed a very detailed and intricate procedure for the processing of such cases by the MSPB, the EEOC, and the courts. The procedure provides the employee with several options to pursue administration and judicial relief: file an appeal with the MSPB and later receive EEOC review; or file an EEOC administrative complaint and later receive an MSPB hearing on the personnel action.

5 U.S.C. § 7702. Actions involving discrimination.

(a) (1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who--

(A) has been effected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by--

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16c),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves--

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of--

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b) (1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either--

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law--

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5) (A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and--

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law,

(A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole--

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d) (1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including--

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2) (A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6) (A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of--

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e) (1) Notwithstanding any other provision of law, if at any time after--

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this title, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 216(d)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

b. Regulatory Implementation. Both the MSPB and the EEOC have published regulations establishing detailed procedures, consistent with 5 U.S.C. § 7702, for the processing of "mixed cases." MSPB regulations are at 5 C.F.R. Part 1201, Subpart D. EEOC regulations are at 29 C.F.R. Part 1614, Subpart C.

(1) EEOC Regulations. 29 C.F.R. Part 1614.

29 C.F.R. § 1614.302. Mixed case complaints.

(a) Definitions. (1) Mixed case complaint. A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) Mixed case appeals. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

(b) Election. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 C.F.R. 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The

person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to ' 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) Dismissal. (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(d) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 C.F.R. 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that § 1614.107(d) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(d), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) Procedures for agency processing of mixed case complaints. When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 C.F.R. 1201.154(a) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 20 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with section 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 20 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

29 C.F.R. § 1614.303. Petitions to the EEOC from MSPB decisions on mixed case appeals and complaints.

(a) Who may file. Individuals who have received a final decision from the MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint under 5 C.F.R. part 1201, subpart E and 5 U.S.C. 7702 may petition EEOC to consider that decision. The EEOC will not accept appeals from MSPB dismissals without prejudice.

(b) Method of filing. Filing shall be made by certified mail, return receipt requested, to the Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036.

(c) Time to file. A petition must be filed with the Commission either within 30 days of receipt of the final decision of the MSPB or within 30 days of when the decision of a MSPB field office becomes final.

(d) Service. The petition for review must be served upon all individuals and parties on the MSPB's service list by certified mail on or before the filing with the Commission, and the Clerk of the MSPB, 1120 Vermont Ave., N.W., Washington, D.C. 20419, and the petitioner must certify as to the date and method of service.

29 C.F.R. § 1614.304. Contents of petition.

(a) Form. Petitions must be written or typed, but may use any format including a simple letter format. Petitioners are encouraged to use EEOC Form 573, Notice Of Appeal/Petition.

(b) Contents. Petitions must contain the following:

(1) The name and address of the petitioner;

(2) The name and address of the petitioner's representative, if any;

(3) A statement of the reasons why the decision of the MSPB is alleged to be incorrect, in whole or in part, only with regard to issues of discrimination based on race, color, religion, sex, national origin, age or handicap;

(4) A copy of the decision issued by the MSPB; and

(5) The signature of the petitioner or representative, if any.

29 C.F.R. § 1614.305. Consideration procedures.

(a) Once a petition is filed, the Commission will examine it and determine whether the Commission will consider the decision of the MSPB. An agency may oppose the petition, either on the basis that the Commission should not consider the MSPB's decision or that the Commission should concur in the MSPB's decision, by filing any such argument with the Office of Federal Operations and serving a copy on the petitioner within 15 days of receipt by the Commission.

(b) The Commission shall determine whether to consider the decision of the MSPB within 30 days of receipt of the petition by the Commission's Office of Federal Operations. A determination of the Commission not to consider the decision shall not be used as evidence with respect to any issue of discrimination in any judicial proceeding concerning that issue.

(c) If the Commission makes a determination to consider the decision, the Commission shall within 60 days of the date of its determination, consider the entire record of the proceedings of the MSPB and on the basis of the evidentiary record before the Board as supplemented in accordance with paragraph (d) of this section, either:

(1) Concur in the decision of the MSPB; or

(2) Issue in writing a decision that differs from the decision of the MSPB to the extent that the Commission finds that, as a matter of law:

(i) The decision of the MSPB constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in 5 U.S.C. 7702(a)(1)(B), or

(ii) The decision involving such provision is not supported by the evidence in the record as a whole.

(d) In considering any decision of the MSPB, the Commission, pursuant to 5 U.S.C. § 7702(b)(4), may refer the case to the MSPB for the taking of additional evidence within such period as permits the Commission to make a decision within the 60-day period prescribed or provide on its own for the taking of additional evidence to the extent the Commission considers it necessary to supplement the record.

(e) Where the EEOC has differed with the decision of the MSPB under § 1614.305(c)(2), the Commission shall refer the matter to the MSPB.

29 C.F.R. § 1614.306. Referral of case to Special Panel.

If the MSPB reaffirms its decision under 5 C.F.R. 1201.162(a)(2) with or without modification, the matter shall be immediately certified to the Special Panel established pursuant to 5 U.S.C. § 7702(d). Upon certification, the Board shall, within five days (excluding Saturdays, Sundays, and Federal holidays), transmit to the Chairman of the Special Panel and to the Chairman of the EEOC the administrative record in the proceeding including--

(a) The factual record compiled under this section, which shall include a transcript of any hearing(s);

(b) The decisions issued by the Board and the Commission under 5 U.S.C. 7702; and

(c) A transcript of oral arguments made, or legal brief(s) filed, before the Board and the Commission.

29 C.F.R. § 1614.307. Organization of Special Panel.

(a) The Special Panel is composed of:

(1) A Chairman appointed by the President with the advice and consent of the Senate, and whose term is 6 years;

(2) One member of the MSPB designated by the Chairman of the Board each time a panel is convened;

(3) One member of the EEOC designated by the Chairman of the Commission each time a panel is convened.

(b) Designation of Special Panel member. (1) Time of designation. Within five days of certification of the case to the Special Panel, the Chairman of the MSPB and the Chairman of the EEOC shall each designate one member from their respective agencies to serve on the Special Panel.

(2) Manner of designation. Letters of designation shall be served on the Chairman of the Special Panel and the parties to the appeal.

29 C.F.R. § 1614.308. Practices and procedures of the Special Panel.

(a) Scope. The rules in this subpart apply to proceedings before the Special Panel.

(b) Suspension of rules. In the interest of expediting a decision, or for good cause shown, the Chairman of the Special Panel may, except where the rule is required by statute, suspend these rules on application of a party, or on his or her own motion, and may order proceedings in accordance with his or her direction.

(c) Time limit for proceedings. Pursuant to 5 U.S.C. § 7702(d)(2)(A), the Special Panel shall issue a decision within 45 days of the matter being certified to it.

(d) Administrative assistance to Special Panel.

(1) The MSPB and the EEOC shall provide the Panel with such reasonable and necessary administrative resources as determined by the Chairman of the Special Panel.

(2) Assistance shall include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the EEOC shall be responsible for all administrative costs incurred by the Special Panel and, to the extent practicable, shall equally divide the costs of providing such administrative assistance. The Chairman of the Special Panel shall resolve the manner in which costs are divided in the event of a disagreement between the Board and the EEOC.

(e) Maintenance of the official record. The Board shall maintain the official record. The Board shall transmit two copies of each submission filed to each member of the Special Panel in an expeditious manner.

(f) Filing and service of pleadings. (1) The parties shall file the original and six copies of all submissions with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. One copy of each submission shall be served on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be by mail or by personal delivery during normal business hours (8:15 a.m. - 4:45 p.m.). Due to the short statutory time limit, parties are required to file their submissions by overnight delivery service should they file by mail.

(4) The date of filing shall be determined by the date of mailing as indicated by the order date for the overnight delivery service. If the filing is by personal delivery, it shall be considered filed on that date it is received in the office of the Clerk, MSPB.

(g) Briefs and responsive pleadings. If the parties wish to submit written argument, briefs shall be filed with the Special Panel within 15 days of the date of the Board's certification order. Due to the short statutory time limit responsive pleadings will not ordinarily be permitted.

(h) Oral argument. The parties have the right to oral argument if desired. Parties wishing to exercise this right shall so indicate at the time of filing their brief, or if no brief is filed, within 15 days of the date of the Board's certification order. Upon receipt of a request for argument, the Chairman of the Special Panel shall determine the time and place for argument and the time to be allowed each side, and shall so notify the parties.

(i) Post-argument submissions. Due to the short statutory time limit, no post-argument submissions will be permitted except by order of the Chairman of the Special Panel.

(j) Procedural matters. Any procedural matters not addressed in these regulations shall be resolved by written order of the Chairman of the Special Panel.

29 C.F.R. § 1614.309. Enforcement of Special Panel decision.

The Board shall, upon receipt of the decision of the Special Panel, order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board shall apply. These regulations are set out at 5 C.F.R. part 1201, subpart E.

29 C.F.R. § 1614.310. Right to file a civil action.

An individual who has a complaint processed pursuant to 5 C.F.R. part 1201, subpart E or this subpart is authorized by 5 U.S.C. § 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.

(2) MSPB Regulations. 5 C.F.R. Part 1201, Subpart E.

§ 1201.154 Time for filing appeal; closing record in cases involving grievance decisions.

Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

(a) Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the

agency or file an appeal with the Board within 20 days after the effective date of the agency action being appealed.

(b) If the appellant has filed a timely formal complaint of discrimination with the agency:

(1) An appeal must be filed within 20 days after the appellant receives the agency resolution or final decision on the discrimination issue; or

(2) If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

(d) If the appellant has filed a grievance with the agency under its negotiated grievance procedure in accordance with 5 U.S.C. § 7121, he or she may ask the Board to review the final decision under 5 U.S.C. § 7702 within 25 days of the date of issuance of that decision. The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

(3) Arguments in support of the stated grounds that refer specifically to relevant documents, and that include relevant citations of authority; and

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or tape recording of the hearing.

(e) The record will close upon expiration of the period for filing the response to the petition for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

5 C.F.R. § 1201.156 Time for processing appeals involving allegations of discrimination.

(a) Issue raised in appeal. When an appellant alleges prohibited discrimination in the appeal, the judge will decide both the issue of discrimination and the appealable action within 120 days after of the appeal is filed.

(b) Issue not raised in appeal. When an appellant has not alleged prohibited discrimination in the appeal, but has raised the issue later in the proceeding, the judge will decide both the issue of discrimination and the appealable action within 120 days after the issue is raised.

(c) Discrimination issue remanded to agency. When the judge remands an issue of discrimination to the agency, adjudication will be completed within 120 days after the issue is raised.

5 C.F.R. § 1201.157 Notice of right to judicial review.

Any final decision of the Board under 5 U.S.C. § 7702 will notify the appellant of his or her right, within 30 days after receiving the Board's final decision, to petition the Equal Employment Opportunity Commission to consider the Board's decision, or to file a civil action in an appropriate United States district court. If an appellant elects to waive the discrimination issue, an appeal may be filed with the United States Court of Appeals for the Federal Circuit as stated in ' 1201.119 of this part.

REVIEW OF BOARD DECISION

5 C.F.R. § 1201.161 Action by the Equal Employment Opportunity Commission; judicial review.

(a) Time limit for determination. In cases in which an appellant petitions the Equal Employment Opportunity Commission for consideration of the Board's decision under 5 U.S.C. § 7702(b)(2), the Commission will determine, within 30 days after the date of petition, whether it will consider the decision.

(b) Judicial review. The Board's decision will become judicially reviewable on:

(1) The date on which the decision is issued, if the appellant does not file a petition with the Commission under 5 U.S.C. § 7702(b)(1); or

(2) The date of the Commission's decision that it will not consider the petition filed under 5 U.S.C. § 7702(b)(2).

(c) Commission processing and time limits. If the Commission decides to consider the decision of the Board, within 60 days after making its decision, it will complete its consideration and either:

(1) Concur in the decision of the Board; or

(2) Issue in writing and forward to the Board for its action under § 1201.162 of this subpart another decision, which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law:

(i) The decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive related to prohibited discrimination; or

(ii) The evidence in the record as a whole does not support the decision involving that provision.

(d) Transmittal of record. The Board will transmit a copy of its record to the Commission upon request.

(e) Development of additional evidence. When asked by the Commission to do so, the Board or a judge will develop additional evidence

necessary to supplement the record. This action will be completed within a period that will permit the Commission to make its decision within the statutory 60-day time limit referred to in paragraph (c) of this section. The Board or the judge may schedule additional proceedings if necessary to comply with the Commission's request.

(f) Commission concurrence in Board decision. If the Commission concurs in the decision of the Board under 5 U.S.C. § 7702(b)(3)(A), the appellant may file suit in an appropriate United States district court.

5 C.F.R. § 1201.162 Board action on the Commission decision; judicial review.

(a) Board decision. Within 30 days after receipt of a decision of the Commission issued under § 1201.161(c)(2), the Board shall consider the decision and:

(1) Concur and adopt in whole the decision of the Commission; or

(2) To the extent that the Board finds that, as a matter of law:

(i) The Commission decision is based on an incorrect interpretation of any provision of any civil service law, rule, regulation, or policy directive; or

(ii) The evidence in the record as a whole does not support the Commission decision involving that provision, it may reaffirm the decision of the Board. In doing so, it may make revisions in the decision that it determines are appropriate.

(b) Judicial review. If the Board concurs in or adopts the decision of the Commission under paragraph (a)(1) of this section, the decision of the Board is a judicially reviewable action.

5 C.F.R. 1201.171 Referral of case to Special Panel.

If the Board reaffirms its decision under § 1201.162(a)(2) of this part with or without modification, it will certify the matter immediately to a Special Panel established under 5 U.S.C. § 7702(d). Upon certification, the Board, within 5 days (excluding Saturdays, Sundays, and Federal holidays), will transmit the administrative record in the proceeding to the Chairman of the Special Panel and to the Commission. That record will include the following:

(a) The factual record compiled under this section, which will include a transcript of any hearing;

(b) The decisions issued by the Board and the Commission under 5 U.S.C. § 7702; and

(c) A transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

5 C.F.R. § 1201.172 Organization of Special Panel; designation of members.

(a) A Special Panel is composed of:

(1) A Chairman, appointed by the President with the advice and consent of the Senate, whose term is six (6) years;

(2) One member of the Board, designated by the Chairman of the Board each time a Panel is convened;

(3) One member of the Commission, designated by the Chairman of the Commission each time a Panel is convened.

(b) Designation of Special Panel members. --

(1) Time of designation. Within 5 days of certification of a case to a Special Panel, the Chairman of Board and the Chairman of the Commission each will designate one member from his or her agency to serve on the Special Panel.

(2) Manner of designation. Letters designating the Panel members will be served on the Chairman of the Panel and on the parties to the appeal.

5 C.F.R. § 1201.173 Practices and procedures of Special Panel.

(a) Scope. The rules in this subpart apply to proceedings before a Special Panel.

(b) Suspension of rules. Unless a rule is required by statute, the Chairman of a Special Panel may suspend the rule, in the interest of expediting a decision or for other good cause shown, and may conduct the proceedings in a manner he or she directs. The Chairman may take this action at the request of a party, or on his or her own motion.

(c) Time limit for proceedings. In accordance with 5 U.S.C. § 7702(d)(2)(A), the Special Panel will issue a decision within 45 days after a matter has been certified to it.

(d) Administrative assistance to the Special Panel.

(1) The Board and the Commission will provide the Panel with the administrative resources that the Chairman of the Special Panel determines are reasonable and necessary.

(2) Assistance will include, but is not limited to, processing vouchers for pay and travel expenses.

(3) The Board and the Commission are responsible for all administrative costs the Special Panel incurs, and, to the extent practicable, they will divide equally the costs of providing administrative assistance. If the Board and the Commission disagree on the manner in which costs are to be divided, the Chairman of the Special Panel will resolve the disagreement.

(e) Maintaining the official record. The Board will maintain the official record of the appeal. It will transmit two copies of each submission that is filed to each member of the Special Panel in an expeditious manner.

(f) Filing and service of pleadings.

(1) The parties must file the original and six copies of each submission with the Clerk, Merit Systems Protection Board, 1120 Vermont Avenue, NW., Washington, DC 20419. The Office of the Clerk will serve one copy of each submission on the other parties.

(2) A certificate of service specifying how and when service was made must accompany all submissions of the parties.

(3) Service may be made by mail or by personal delivery during the Board's normal business hours (8:30 a.m. to 5:00 p.m.). Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail, provided by the U.S. Postal Service, if they file their submissions by mail.

(4) A submission filed by Express Mail is considered to have been filed on the date of the Express Mail Order. A submission that is delivered personally is considered to have been filed on the date the Office of the Clerk of the Board receives it.

(g) Briefs and responsive pleadings. If the parties wish to submit written argument, they may file briefs with the Special Panel within 15 days after the date of the Board's certification order. Because of the short statutory time limit for processing these cases, the Special Panel ordinarily will not permit responsive pleadings.

(h) Oral argument. The parties have the right to present oral argument. Parties wishing to exercise this right must indicate this desire when they file their briefs or, if no briefs are filed, within 15 days after the date of the Board's certification order. Upon receiving a request for argument, the Chairman of the Special Panel will determine the time and place for argument and the amount of time to be allowed each side, and he or she will provide this information to the parties.

(i) Postargument submission. Because of the short statutory time limit for processing these cases, the parties may not file postargument submissions unless the Chairman of the Special Panel permits those submissions.

(j) Procedural matters. Any procedural matters not addressed in these regulations will be resolved by written order of the Chairman of the Special Panel.

5 C.F.R. § 1201.174 Enforcing the Special Panel decision.

The Board, upon receipt of the decision of the Special Panel, will order the agency concerned to take any action appropriate to carry out the decision of the Panel. The Board's regulations regarding enforcement of a final order of the Board apply to this matter. These regulations are set out in Subpart F of this part.

5 C.F.R. § 1201.175 Judicial review of cases decided under 5 U.S.C. § 7702.

(a) Place and type of review. The appropriate United States district court is authorized to conduct all judicial review from cases decided under 5 U.S.C. § 7702. Those cases include appeals taken under the following provisions: Section 717(c) of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e-16(c)); section 15(c) of the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. 633a(c)); and section 15(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216(b)).

(b) Time for filing. Regardless of any other provision of law, requests for judicial review of all cases decided under 5 U.S.C. § 7702 must be filed within 30 days after the appellant received notice of the judicially reviewable action. The issue of equitable tolling of this period under Irwin has not been litigated.

9.4 Exclusivity of Title VII Remedy.

In the private sector, the Federal courts have recognized that certain post-Reconstruction civil rights statutes, e.g., 42 U.S.C. § 1981, may provide alternative theories upon which to attack discriminatory employment practices. The Supreme Court reviewed the applicability of these laws to federal employees in the following case:

Brown v. General Services Administration
425 U.S. 820 (1976)

MR. JUSTICE STEWART delivered the opinion of the Court.

The principal question presented by this case is whether § 717 of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in Federal employment.

The petitioner, Clarence Brown, is a Negro who has been employed by the General Services Administration since 1957. He is currently classified in grade GS-7 and has not been promoted since 1966. In December 1970 Brown was referred, along with two white colleagues, for promotion to grade GS-9 by his supervisors. All three were rated "highly qualified," and the promotion was given to one of the white candidates for the position. Brown filed a complaint with the GSA Equal Employment Opportunity Office alleging that racial discrimination had biased the selection process. That complaint was withdrawn when Brown was told that other GS-9 positions would soon be available.

Another GS-9 position did become vacant in June 1971, for which the petitioner along with two others was recommended as "highly qualified." Again a white applicant was chosen. Brown filed a second administrative complaint with the GSA Equal Employment Opportunity Office. After preparation and review of an investigative report, the GSA Regional Administrator notified the petitioner

that there was no evidence that race had played a part in the promotion. Brown requested a hearing, and one was held before a complaints examiner of the Civil Service Commission. In February 1973, the examiner issued his findings and recommended decision. He found no evidence of racial discrimination; rather, he determined that Brown had not been advanced because he had not been "fully cooperative."

The GSA rendered its final decision in March 1973. The Agency's Director of Civil Rights informed Brown by letter of his conclusion that considerations of race had not entered the promotional process. The Director's letter told Brown that if he chose, he might carry the administrative process further by lodging an appeal with the Board of Appeals and Review of the Civil Service Commission and that, alternatively, he could file suit within 30 days in Federal district court.

Forty-two days later Brown filed suit in a Federal District Court. The complaint alleged jurisdiction under Title VII . . ."with particular reference to" § 717; under 28 U.S.C. § 1331 (general Federal-question jurisdiction); under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; and under the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981.

The respondents moved to dismiss the complaint for lack of subject-matter jurisdiction, on the ground that Brown had not filed the complaint within 30 days of final agency action as required by § 717(c) The District Court granted the motion.

The Court of Appeals for the Second Circuit affirmed the judgment of dismissal. 507 F.2d 1300 (1974). It held, first, that the § 717 remedy for Federal employment discrimination was retroactively available to any employee, such as the petitioner, whose administrative complaint was pending at the time § 717 became effective on March 24, 1972. The appellate court held, second, that § 717 provides the exclusive judicial remedy for Federal employment discrimination, and that the complaint had not been timely filed under that statute. Finally, the court ruled that if § 717 did not pre-empt other remedies, then the petitioner's complaint was still properly dismissed because of his failure to exhaust available administrative remedies. We granted certiorari, 421 U.S. 987 (1975), to consider the important issues of Federal law presented by this case.

The primary question in this litigation is not difficult to state: Is § 717 . . . the exclusive individual remedy available to a Federal employee complaining of job-related racial discrimination? But the question is easier to state than it is to resolve. Congress simply failed explicitly to describe § 717's position in the constellation of antidiscrimination law. We must, therefore, infer congressional intent in less obvious ways. As Mr. Chief Justice Marshall once wrote for the Court: "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ." United States v. Fisher, 2 Cranch 358, 386 (1805).

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex, or national origin. . . . Until it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect Federal employees. . . . Although Federal employment

discrimination clearly violated both the Constitution, Bolling v. Sharpe 347 U.S. 497 (1954), and statutory law, 5 U.S.C. § 7151, before passage of the 1972 Act, the effective availability of either administrative or judicial relief was far from sure. Charges of racial discrimination were handled parochially within each Federal agency. . . . Although review lay in the Board of Appeals and Review of the Civil Service Commission, Congress found "skepticism" among Federal employees "regarding the Commission's record in obtaining just resolutions of complaints and adequate remedies. This has, in turn, discouraged persons from filing complaints with the Commission for fear that doing so will only result in antagonizing their supervisors and impairing any future hope of advancement."

If administrative remedies were ineffective, judicial relief from Federal employment discrimination was even more problematic before 1972. Although an action seeking to enjoin unconstitutional agency conduct would lie, it was doubtful that backpay or other compensatory relief for employment discrimination was available at the time that Congress was considering the 1972 Act. For example, in Gnotta v. United States, 415 F.2d 1271, the Court of Appeals for the Eighth Circuit had held in 1969 that there was no jurisdictional basis to support the plaintiff's suit alleging that the Corps of Engineers had discriminatorily refused to promote him. Damages for alleged discrimination were held beyond the scope of the Tucker Act, 28 U.S.C. § 1346, since no express or implied contract was involved. . . . And the plaintiff's cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Mandamus Act, 28 U.S.C. § 1361, was held to be barred by sovereign immunity, since his claims for promotion would necessarily involve claims against the Treasury.

. . . .

Concern was evinced during the hearings before the committees of both Houses over the apparent inability of Federal employees to engage the judicial machinery in cases of alleged employment discrimination. . . . Although there was considerable disagreement over whether a civil action would lie to remedy agency discrimination, the committees ultimately concluded that judicial review was not available at all or, if available, that some forms of relief were foreclosed. . . . .

The conclusion of the committees was reiterated during floor debate. Senator Cranston, coauthor of the amendment relating to Federal employment, asserted that it would, "[f]or the first time, permit Federal employees to sue the Federal Government in discrimination cases . . . ." 118 Cong. Rec. 4929 (1972). Senator Williams, sponsor and floor manager of the bill, stated that it "provides, for the first time, to my knowledge, for the right of an individual to take his complaint to court." Id., at 4922.

The legislative history thus leaves little doubt that Congress was persuaded that Federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that conclusion was entirely reasonable. Whether that understanding of Congress was in some ultimate sense incorrect is not what is important in determining the legislative intent in amending the 1964 Civil Rights Act to cover Federal employees. For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was.

This unambiguous congressional perception seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive administrative and judicial scheme for the redress of Federal employment discrimination. We need not, however, rest our decision upon this inference alone. For the structure of the 1972 amendment itself fully confirms the conclusion that Congress intended it to be exclusive and pre-emptive.

. . . .

Sections 717(b) and (c) establish complementary administrative and judicial enforcement mechanisms designed to eradicate Federal employment discrimination. . . . [The Court reviews the organization of ' 717 and the enforcement scheme established.]

The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717, with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible. The crucial administrative role that each agency together with the Civil Service Commission was given by Congress in the eradication of employment discrimination would be eliminated "by the simple expedient of putting a different label on [the] pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973). It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

The petitioner relies upon our decision in Johnson v. Railway Express Agency, 421 U.S. 454 (1975), for the proposition that Title VII did not repeal pre-existing remedies for employment discrimination. In Johnson the Court held that in the context of private employment Title VII did not pre-empt other remedies. But that decision is inapposite here. In the first place, there were no problems of sovereign immunity in the context of the Johnson case. Second, the holding in Johnson rested upon the explicit legislative history of the 1964 Act which "manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and Federal statutes." 421 U.S., at 459, quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). Congress made clear "that the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1886, 42 U.S.C. ' 1981, and that the two procedures augment each other and are not mutually exclusive." 421 U.S., at 459, quoting H.R. Rep. No. 92-238, p. 19 (1971). See also Jones v. Alfred H. Mayer Co., 392 U.S. 409 415-417 (1968). There is no such legislative history behind the 1972 amendments. Indeed, as indicated above, the congressional understanding was precisely to the contrary.

In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies. . . .

In the case at bar . . .the established principle leads unerringly to the conclusion that § 717 of the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in Federal employment.

We hold, therefore, that since Brown failed to file a timely complaint under § 717(c), the District Court properly dismissed the case. Accordingly, the judgment is affirmed.

It is so ordered.

Note. One of the reasons Federal employees have attempted to use legal theories other than Title VII to obtain judicial review is the restrictive 90-day limit on filing suit in Federal court.[1] How successful would a plaintiff be in reviving an EEO claim (and thereby obtaining an additional 30 days within which to sue) by filing a request to reopen with the EEOC? In Chickillo v. Commanding Officer, 406 F. Supp. 807 (E.D. Pa. 1976), aff'd without opinion, 547 F.2d 1159 (3d Cir. 1977), the court would not permit this sort of attempt to skirt the timeliness requirements. Since then, however, the Supreme Court has recognized a limited equitable tolling of many statutes of limitation, particularly those in title VII. In Irwin v. Veterans Admin., 111 S. Ct. 453 (1990), the Court found that an attempted, but defective, pleading or affirmative deceit by the employer can be grounds for an appropriate equitable extension of the filing deadline in Title VII cases.

9.5 Scope of Judicial Review - Federal EEO Complaints.

When Congress amended Title VII in 1972 to include Federal employees, it directed that certain of the existing procedural provisions in Title VII should govern civil actions by Federal employees, "as applicable." 42 U.S.C. § 2000e-16(d). The referenced provisions established the specific rules and guidelines for private sector litigation, and the meaning of the phrase "as applicable" caused confusion in the lower Federal courts. One of the primary issues was whether a Federal employee was entitled to a trial de novo or merely a review of the administrative record in Federal court. The U.S. Supreme Court resolved this issue in Chandler v. Roudebush, 425 U.S. 840 (1976), where it found a right to trial de novo in district court.

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[1]Complainants previously had 30 days to file a civil action in federal; this was extended to 90 days by the Civil Rights Act of 1991, Pub. L. 102-166 (codified at 42 U.S.C. § 2000e-16). Many of the courts that previously considered the question concluded that the 30-day requirement was a jurisdictional prerequisite to maintain the action. See Eastland v. Tennessee Valley Authority, 553 F.2d 364 (5th Cir. 1977). Recently, however, the Supreme Court held that the 30-day suit filing period in 42 U.S.C. § 2000e-16(c) was not jurisdictional but was more in the nature of a statute of limitations, which, in appropriate circumstances, could be subject to equitable tolling. Irwin v. Veterans Administration, 111 S. Ct. 453 (1990).

When an employee seeks judicial review of a mixed case, the district court will hear the discrimination issues de novo, but performs only a record review of the nondiscrimination issues of the mixed case. See Morales v. MSPB, 932 F.2d 800 (9th Cir. 1991); Rana v. United States, 812 F.2d 887 (4th Cir. 1987); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986); Hayes v. Government Printing Office, 684 F.2d 137 (D.C. Cir. 1982).

9.6 Analysis of EEO Litigation.

Seldom does a plaintiff alleging discrimination have the benefit of direct evidence of discrimination. Because of the difficulty of litigating cases of discrimination based on circumstantial evidence, the Supreme Court established a method of analyzing to analyze these cases. In a series of cases beginning with McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court developed an order of proof and allocation of burdens under a "shifting burdens test." The Court later redefined the test in Texas Dep't of Community Affairs v. Burdine, 420 U.S. 248 (1981). The combination of the two cases has given rise to the name often associated with the test; McDonnell-Douglas/Burdine test. Despite its name, however, the Court probably best explained the test in U.S. Postal Service v. Aikens, 460 U.S. 711 (1983).

The McDonnell-Douglas/Burdine test begins with the employee bearing the burden of proof to establish a "prima facie" case of discrimination. The elements of such a case vary based on the employment action involved. In a failure to hire case, for example, a black applicant alleging a racially discriminatory refusal to hire would show that (1) he was black, (2) he was qualified for the position for which he applied, (3) he was not offered the position, and (4) the position was filled with someone not black or the employer continued to seek persons who were not black while the position remained open. The burden then shifts to the employer to "articulate" a valid, nondiscriminatory reason for its actions. This is a burden of production, not persuasion. the stated reason must be one that, if true, would explain the employer's actions. If the employer fails to produce a facially valid reason for its actions, the employee wins.

After twenty years of litigation and three Supreme Court cases, the federal courts still disagreed over the proper application of the McDonnell-Douglas/Burdine test when the employer succeeded in presenting a facially valid, nondiscriminatory reason for its actions. The Court attempted to resolve the dispute in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), portions of which are reproduced below.

ST. MARY'S HONOR CENTER, et al., Petitioners
v.
Melvin HICKS.

113 S.Ct. 2742 (1993)

Justice SCALIA delivered the opinion of the Court.

Petitioner St. Mary's Honor Center (St. Mary's) is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). Respondent Melvin Hicks, a black man, was hired as a correctional officer at St. Mary's in August 1978 and was promoted to shift commander, one of six supervisory positions, in February 1980.

In 1983 MDCHR conducted an investigation of the administration of St. Mary's, which resulted in extensive supervisory changes in January 1984. Respondent retained his position, but John Powell became the new chief of custody (respondent's immediate supervisor) and petitioner Steve Long the new superintendent. Prior to these personnel changes respondent had enjoyed a satisfactory employment record, but soon thereafter became the subject of repeated, and increasingly severe, disciplinary actions. He was suspended for five days for violations of institutional rules by his subordinates on March 3, 1984. He received a letter of reprimand for alleged failure to conduct an adequate investigation of a brawl between inmates that occurred during his shift on March 21. He was later demoted from shift commander to correctional officer for his failure to ensure that his subordinates entered their use of a St. Mary's vehicle into the official log book on March 19, 1984. Finally, on June 7, 1984, he was discharged for threatening Powell during an exchange of heated words on April 19.

Respondent brought this suit in the United States District Court for the Eastern District of Missouri, alleging that petitioner St. Mary's violated s 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. ' 2000e- 2(a)(1), and that petitioner Long violated Rev.Stat. s 1979, 42 U.S.C. ' 1983, by demoting and then discharging him because of his race. After a full bench trial, the District Court found for petitioners. 756 F. Supp. 1244 (E.D.Mo.1991). The United States Court of Appeals for the Eighth Circuit reversed and remanded, 970 F.2d 487 (1992), and we granted certiorari, 506 U.S. ____, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993).

II

[1] Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides in relevant part:

> "It shall be an unlawful employment practice for an employer--
> "(1) . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a).

With the goal of "progressively sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (1981), our opinion in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases. [FN1] The plaintiff in such a case, we said, must first establish, by a preponderance of the evidence, a "prima facie" case of racial discrimination. Burdine, supra, at 252-253, 101 S.Ct., at 1093-1094. Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case (set out in McDonnell Douglas, supra, at 802, 93 S.Ct. at 1824 - 1825) by proving (1) that he is black, (2) that he was qualified for the position of shift commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and was ultimately filled by a white man. 756 F. Supp., at 1249-1250.

.....

Under the McDonnell Douglas scheme, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." Burdine, supra, at 254, 101 S.Ct., at 1094. To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). 1 D. Louisell & C. Mueller, Federal Evidence s 67, p. 536 (1977). Thus, the McDonnell Douglas presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case--i.e., the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." Burdine, 450 U.S., at 254, 101 S.Ct., at 1094. "[T]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action. Id., at 254-255, and n. 8, 101 S.Ct., at 1094-1095, and n. 8. It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," id., at 253, 101 S.Ct., at 1093. In this regard it operates like all presumptions, as described in Rule 301 of the Federal Rules of Evidence:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of

> proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

Respondent does not challenge the District Court's finding that petitioners sustained their burden of production by introducing evidence of two legitimate, nondiscriminatory reasons for their actions: the severity and the accumulation of rules violations committed by respondent. 756 F. Supp., at 1250. Our cases make clear that at that point the shifted burden of production became irrelevant: "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," Burdine, 450 U.S., at 255, 101 S.Ct., at 1094-1095, and "drops from the case," id., at 255, n. 10, 101 S.Ct., at 1095, n. 10. The plaintiff then has "the full and fair opportunity to demonstrate," through presentation of his own case and through cross-examination of the defendant's witnesses, "that the proffered reason was not the true reason for the employment decision," id., at 256, 101 S.Ct., at 1095, and that race was. He retains that "ultimate burden of persuading the [trier *2748 of fact] that [he] has been the victim of intentional discrimination." Ibid.

The District Court, acting as trier of fact in this bench trial, found that the reasons petitioners gave were not the real reasons for respondent's demotion and discharge. It found that respondent was the only supervisor disciplined for violations committed by his subordinates; that similar and even more serious violations committed by respondent's coworkers were either disregarded or treated more leniently; and that Powell manufactured the final verbal confrontation in order to provoke respondent into threatening him. 756 F. Supp., at 1250-1251. It nonetheless held that respondent had failed to carry his ultimate burden of proving that his race was the determining factor in petitioners' decision first to demote and then to dismiss him.

In short, the District Court concluded that "although [respondent] has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated." Id., at 1252.

.....

> The Court of Appeals set this determination aside on the ground that "[o]nce [respondent] proved all of [petitioners'] proffered reasons for the adverse employment actions to be pretextual, [respondent] was entitled to judgment as a matter of law." 970 F.2d, at 492. The Court of Appeals reasoned: "Because all of defendants' proffered reasons were discredited, defendants were in a position of having offered no legitimate reason for their actions. In other words, defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race." Ibid.

That is not so. By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, petitioners sustained their burden of production, and thus placed themselves in a "better position than if they had remained silent."

If, on the other hand, the defendant has succeeded in carrying its burden of production, the McDonnell Douglas framework--with its presumptions and burdens--is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in Burdine that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons. "450 U.S., at 254, 101 S.Ct. at 1094. The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. Id., at 255, 101 S.Ct., at 1094-1095. The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race, id., at 253, 101 S.Ct., at 1093. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, [FN4] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion." See, e.g., United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (citing Burdine, supra, at 256, 101 S.Ct., at 1095); Patterson v. McLean Credit Union, 491 U.S. 164, 187, 109 S.Ct. 2363, 2378, 105 L.Ed.2d 132 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 245-246, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989) (plurality opinion of Brennan, J., joined by Marshall, BLACKMUN, and STEVENS, JJ.); id., at 260, 109 S.Ct., at 1795-1796 (WHITE, J., concurring in judgment); id., at 270, 109 S.Ct., at 1801 (O'CONNOR, J., concurring in judgment); id., at 286-288, *2750 109 S.Ct., at 1809-1810 (KENNEDY, J., joined by THE CHIEF JUSTICE and SCALIA, J., dissenting); Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875, 104 S.Ct. 2794, 2799, 81 L.Ed.2d 718 (1984); cf. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 659-660, 109 S.Ct. 2115, 2125-2126, 104 L.Ed.2d 733 (1989); id., at 668, 109 S.Ct., at 2130 (STEVENS, J., dissenting);

Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986, 108 S.Ct. 2777, 2784, 101 L.Ed.2d 827 (1988).

We reaffirm today what we said in Aikens:

"[T]he question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of presentation of proof,' Burdine, 450 U.S., at 252 [101 S.Ct., at 1093], in deciding this ultimate question." Aikens, 460 U.S., at 716, 103 S.Ct., at 1482.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justices Souter, White, Blackmun, and Stevens joined in a dissenting opinion to the Hicks majority. The dissent believed a plaintiff who shows pretext is entitled to judgment as a matter of law and supported its theory based on language from the original McDonnell-Douglas decision instead of its clarification in Aikens cited often by the majority. The dissent also argued policy grounds for focusing litigation on a specific reason stated by the employer for its actions and not every possible explanation for the personnel action. The dissent failed to address the majority's brief analysis of the applicability of Fed. R. Civ. Pro. 301 regarding proper application of presumptions.

Many civil rights groups criticized the Hicks decision as a degradation of employee rights and a distortion of the test previously applied, although a majority of the Circuits had applied the test as the Court interpreted in Hicks. Shortly after this decision, opponents in Congress proposed S. 1776 to legislatively overrule Hicks and allow a discrimination plaintiff to prevail by simply rebutting the employer's stated reason for its actions. Although this bill never went through the required committees, the Department of Justice has announced its support for the proposal in future legislation. See Letter from Assistant Attorney General Sheila F. Anthony to Sen. Edward M. Kennedy on S. 1776, 1994 Daily Lab. Rep. 193 d37 (Oct. 7, 1993). This legislation, in effect, would allow a finding of discrimination without proof by a preponderance of the evidence that discrimination motivated the action.

APPENDIX A

FORMS FOR USE

IN

MSPB DISCOVERY PROCEEDINGS

The following is by no means intended to be a complete list of all of the discovery forms that the Agency may utilize during the discovery period. It is intended solely to provide sample formats. Note that Appellants frequently are represented by attorneys who are accustomed to using the discovery procedures and techniques and you, as Agency representative, must be prepared to respond.

1. Motion for the Issuance of Subpoenaes.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES, Appellant,	)	
vs.	)	MSPB Case No: Date: _____
DEPARTMENT OF THE ARMY, Agency.	)	

MOTION FOR THE ISSUANCE OF SUBPOENAES DUCES TECUM

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and hereby requests that subpoenaes duces tecum be issued to the persons named below, directing them to appear at the hearing in the above-named appeal for the purpose of giving their testimony and producing for review, inspection and copying, all letters, memoranda, notes, summaries, or other written records in whatever nature or form, which in any way pertain to (specify the reason or reasons for which you are requesting the records; e.g., records of arrest and conviction, etc.):

(List here the names and addresses of the witnesses for whom subpoenaes are being requested. If you have not done so already, provide a brief summary of the testimony you expect each witness to give.)

The Agency believes that the testimony and documents sought are relevant to the matters at issue in this appeal and that subpoenaes duces tecum are necessary to compel the attendance of the above-named witnesses.

WHEREFORE, the Agency respectfully requests that the Board issue the aforementioned subpoenaes duces tecum.

Respectfully submitted,

_____
Richard Roe
Agency Representative

2. Motion to Compel Answers to Interrogatories and/or Production of Documents

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
	)	
vs.	)	MSPB Case No.:
	)	
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
	)	
Agency.	)	

MOTION TO COMPEL ANSWERS TO INTERROGATORIES

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and pursuant to 5 C.F.R. 1201.72(c)(2), moves for an Order from the administrative judge requiring John A. Jones, Appellant in the above-named appeal, to provide answers to the Agency's First Set of Interrogatories, dated (date).

The Interrogatories were served upon the Appellant and his designated representative on (date). The Appellant has not filed answers to the Interrogatories and has not filed an objection to them.

The evidence and/or information sought is relevant to matters at issue in this appeal, or will lead to the discovery of relevant evidence and/or information. Accordingly, the Agency moves for an Order directing the Appellant forthwith to respond to each and every question set forth in the Agency's First Set of Interrogatories, mentioned above.

For the Agency:

_____
Richard Roe
Agency Representative

(The Motion to Compel Production of Documents is substantially similar to that for compelling answers to Interrogatories.)

3. Motion for the Imposition of Sanctions

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,)
Appellant,)
)
vs.) MSPB Case No.:
)
) Date: _____
DEPARTMENT OF THE ARMY,)
Agency.)

MOTION FOR IMPOSITION OF SANCTIONS

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, pursuant to 5 C.F.R. 1201.43 and, for the reasons set forth below, moves for the imposition of sanctions against the Appellant.

The Agency's First Set of Interrogatories were served upon the Appellant on (date). When the Appellant failed to answer said Interrogatories and filed no objection to them, the Agency sought and obtained an Order from the administrative judge directing the Appellant to submit his/her answers to the Agency on or before (date).

The Appellant has not submitted answers to the Interrogatories and otherwise has failed to respond to the Board's Order.

In view of the Appellant's willful failure to comply with the Order of the administrative judge, the Agency prays that the Board issue an Order dismissing the appeal with prejudice, or imposing such other sanctions against the Appellant as the administrative judge deems appropriate.

Respectfully submitted,

_____
Richard Roe
Agency Representative

4. Motion for Extension of Time

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES, Appellant,	)	
vs.	)	MSPB Case No.: Date _____
DEPARTMENT OF THE ARMY, Agency.	)	

MOTION FOR EXTENSION OF TIME TO ANSWER INTERROGATORIES

COMES NOW, THE DEPARTMENT OF THE ARMY, by and through its designated representative, and moves the administrative judge for an Order granting an extension of time for the reasons set forth below:

On (date), John A. Jones, Appellant, served the Agency with interrogatories pursuant to 5 C.F.R. 1201.72, et seq.

There are 48 of these interrogatories, many of them requiring the Agency to examine its books and records and to compile data, all of which will require a great deal of time.

The Agency is ready and willing to answer said interrogatories, but cannot do so within the period of time fixed by the administrative judge. As shown by the affidavits of the Personnel Officer and the Finance Officer, attached hereto, it will require at least 60 days for the Agency to compile the information necessary to answer said interrogatories.

WHEREFORE, the Agency prays that the Board issue an Order granting the Agency an enlargement of time within which to answer said Interrogatories or, alternatively, to relieve the Agency of the responsibility for providing answers to these interrogatories within the time specified by the administrative judge.

Respectfully submitted,

_____
Richard Roe
Agency Representative

(Be sure to attach the affidavits setting forth a full explanation of the reasons for the Agency's inability to answer the Interrogatories requested.)

INTERROGATORIES/PRODUCTION OF DOCUMENTS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,)
Appellant,)
)
vs.) MSPB Case No.:
) Date: _____
DEPARTMENT OF THE ARMY,)
Agency.)

AGENCY'S FIRST SET OF INTERROGATORIES

THE DEPARTMENT OF THE ARMY, by and through its designated representative, herewith serves upon JOHN A. JONES and his representative, SAM SMITH, the following written interrogatories under the provisions of 5 C.F.R. 1201.72, et seq.

You are required to answer these Interrogatories separately and fully in writing, under oath, and to serve a copy of your answers to the Agency's representative within _____ days after service hereof.

All of the following interrogatories shall be continuing in nature until the date of the hearing, and you are required to supplement your answers as additional information becomes known or available to you.

No. 1

Were you scheduled for duty during the hours from 8 A.M. to 4:30 P.M., on January 2, 3, 4, 7, 8, 9, 10 and 11, 19___?

No. 2

If you were not scheduled for work during the hours cited in Interrogatory No. 1 above, what was your duty schedule for each day listed?

No. 3

Did you report for work for each of the days on which you were scheduled to work, as described in your answers to Interrogatories No. 1 and No. 2?

No. 4

If the answer to Interrogatory No. 3 is "no," please state the reason(s) why you did not report to work on the dates set forth therein, including:

a. whom you advised of these reasons and when;

b. each fact which supports each reason;

c. the identity of each and every document which supports your reasons; and

d. whether you possess any of these documents; if so, which ones.

(Continue with questions designed to elicit information to show that Appellant's absences were unauthorized. You may also ask other questions.)

No ( )

Do you contend that the Agency, in taking the action to remove you from your position, committed harmful error? If your answer is "yes," please state:

a. each fact which supports your contention, including specific references to all statutes, regulations, and procedures which you contend were violated;

b. in what way this alleged error was "harmful;"

c. the identity of each document which supports your contentions; and

d. whether you possess any of the documents; if so, which ones.

For the Agency:

_____

Richard Roe
Agency Representative

REQUEST FOR ADMISSIONS

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
ATLANTA, GEORGIA

JOHN A. JONES,	)	
	)	
Appellant,	)	
vs.	)	MSPB Case No.:
	)	Date: _____
DEPARTMENT OF THE ARMY,	)	
Agency.	)	

REQUEST FOR ADMISSION OF MATTERS AND GENUINENESS OF DOCUMENTS

THE DEPARTMENT OF THE ARMY, by and through its representative, requests that JOHN A. JONES, and his designated representative, SAM SMITH, make the following admissions for the purpose of this appeal only:

That each of the following documents, attached to this Request, is genuine. (Here list the documents and briefly describe each document.)

That each of the following statements is true. (Here list the statements, based upon the reasons stated in the Notice, including statements regarding the past record.)

For the Agency:

_____
Richard Roe
Agency Representative

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

This is to certify that I have this day served (name) in the foregoing case with a copy of these pleadings: Agency's First Set of Interrogatories, Motion to Produce Documents and Request for Admissions, by depositing in the United States mail a copy of the same in a properly addressed envelope as follows with adequate postage:

(Address)

This _____ day of _____, 19___.

_____
Richard Roe
Agency Representative